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Somewhat like a cantankerous, senile grandparent left to vegetate and finally to die in a sterile nursing home, *Fay v. Noia*,[1] the Warren Court's seminal decision broadening the availability of federal habeas corpus for state prisoners, was for several years virtually ignored and has now been all but completely overruled, another victim of the Burger Court's relentless quest for finality in criminal proceedings.[2] *Noia* held, *inter alia*, that a criminal defendant's procedural default[3] in the original state court proceedings, which might bar direct Supreme Court review by virtue of the adequate state ground rule,[4] would not preclude federal habeas relief unless the state proved that the defendant, after consultation with competent counsel, personally participated, for strategic or tactical reasons, in an intentional relinquishment (or deliberate bypass) of the procedure afforded by state law for vindication of the federal constitutional claim.[5]

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1. 372 U.S. 391 (1963).

2. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976) (precluding federal habeas actions by state prisoners asserting fourth amendment claims where the state has provided an opportunity for full and fair litigation thereof); Tollett v. Henderson, 411 U.S. 258 (1973) (barring federal habeas relief in the case of defendant claiming racial discrimination in grand jury selection process on the ground that a valid guilty plea waives antecedent constitutional infirmities).

3. A procedural default is a failure on the part of the defendant to comply with a state statute or rule governing criminal procedure, such as failure to object to an allegedly coerced confession at the time and in the manner prescribed by state law or a failure to file a timely notice of appeal from the judgment of conviction.

4. *See* Fay v. Noia, 372 U.S. 391, 428-30 (1963). The adequate and independent state ground rule precludes Supreme Court review of state court judgments based on both federal and state law grounds, where a contrary resolution of the federal question would not affect the judgment of the court below. The doctrine is presumably rooted in the prohibition against advisory opinions. *Id.* at 430 n.40. In *Noia*, the Court left open whether the adequate state ground rule was constitutionally mandated or "merely a matter of the construction of the statutes defining this Court's appellate review." *Id. Compare* Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945) (stating that the rule is constitutionally mandated).

5. Fay v. Noia, 372 U.S. 391, 438-39 (1963). Although the Court did not explicitly place the burden of proof on the state, it specified that the deliberate bypass test was to be governed by "[t]he classic definition of waiver enunciated in *Johnson* v. *Zerbst*, . . . 'an intentional relinquishment or abandonment of a known right or privilege.' " *Id.* at 439. In Johnson v. Zerbst, 304 U.S. 458, 464 (1938), it was noted "that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional

In the early 1970's, the Burger Court initiated a policy of discreet silence with respect to *Noia,* chipping away at the deliberate bypass test and, at the same time, developing a parallel but completely inconsistent body of law.[6] The Court's primary analytical approach during this period of uncertainty was to ascertain whether any conceivable strategic or tactical advantage might accrue to defendants in general by virtue of the particular type of procedural error that was committed in the state court.[7] If so, defendant's counsel in the case at bar was deemed to have acted on the basis of this consideration; an "inexcusable procedural default" was thereby imputed to the defendant;[8] and the federal habeas claim was barred absent a showing of "good cause" and "actual prejudice."[9] In an analogous fashion, the Court began to utilize a new test for waiver of constitutional rights during trial. Rather than looking to whether defendant intentionally relinquished a known right, the Court instead determined whether the state had "compelled" the accused to forfeit his or her constitutional right; absent such coercion, the ability to assert the claim in a federal habeas action was lost.[10] Thus were the burden of proof and focus of inquiry shifted. Instead of requiring the state to show that,

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rights and that we 'do not presume acquiescence in the loss of fundamental rights.' " *Id.* (footnotes omitted) (quoting in part Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937), and Ohio Bell Tel. Co. v. Public Utils. Comm'n, 301 U.S. 292, 307 (1937)). *See* Estelle v. Williams, 425 U.S. 501, 527 n.8 (1976) (Brennan, J., dissenting). *But see* Sandoval v. Tinsley, 338 F.2d 48, 50 (10th Cir. 1964) (once some evidence of waiver is presented, the burden of proof shifts to the petitioner).

6. *See* Francis v. Henderson, 425 U.S. 536 (1976); Estelle v. Williams, 425 U.S. 501 (1976); Davis v. United States, 411 U.S. 233 (1973).

7. *See* Francis v. Henderson, 425 U.S. 536, 540-41 (1976); Davis v. United States, 411 U.S. 233, 241 (1973) ("Strong tactical considerations would militate in favor of delaying the raising of the claim [of racial discrimination in the grand jury selection process] in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult."). Although the *Davis* case involved a federal prisoner seeking collateral relief in federal court under 28 U.S.C. § 2255 (1970) rather than a state prisoner bringing a habeas action pursuant to 28 U.S.C. § 2254 (1970), the Court had previously held *Noia*'s deliberate bypass requirement applicable to section 2255 actions as well. *See* Kaufman v. United States, 394 U.S. 217, 220 n.3, 227 n.8 (1969). *See generally* Sanders v. United States, 373 U.S. 1, 15 (1963) (finding the section 2255 action to be the "substantial equivalent of federal habeas corpus").

8. Estelle v. Williams, 425 U.S. 501, 513-14 (1976) (Powell, J., concurring) (quoting Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices,* 73 HARV. L. REV. 84, 118 (1959)).

9. Francis v. Henderson, 425 U.S. 536, 542 (1976). The "cause" and "prejudice" requirements were first referred to in Davis v. United States, 411 U.S. 233, 244-45 (1973). In the *Davis* opinion, however, the Court did not make clear whether both elements had to be proved or whether these were alternative requirements. The necessity for proving both was announced in *Francis. See* 425 U.S. at 542.

10. *See* Estelle v. Williams, 425 U.S. 501, 512-13 (1976).

for strategic or tactical reasons, defendant, rather than counsel, deliberately bypassed state remedies for assertion of his or her constitutional claims, the Court ascertained whether the defendant was forced to forsake the federal claim; or, alternatively, if the Court could conceive of any theoretical benefit inuring to the accused as a result of the default, the defendant was required to provide an exculpatory explanation and to show prejudicial effect.

Wainwright v. Sykes,[11] a 1977 decision, sought to end the confusion by overruling *Noia* insofar as it applied to defaults in the course of trial. The Court held that, in order to secure federal habeas relief, a prisoner whose federal claim had not been resolved on the merits in state court, as a result of a procedural default during trial, was required to prove "cause" and "prejudice."[12] As one of the policy bases for its decision, the majority suggested that there was a possible strategic motive for every state court procedural default: as a result of *Fay v. Noia*, defense counsel were encouraged to "sandbag," that is, to commit procedural defaults with respect to constitutional claims so that, in the event of conviction, such claims could be asserted in a federal habeas proceeding.[13] Also cast aside in *Sykes* was the need for personal participation by the defendant in procedural defaults in the course of trial. That requirement was swallowed by a definition of assistance of counsel that made "decisions" of the trial attorney, whether intentional or not, almost inescapably binding on the client.[14]

This Article will examine how and why the deliberate bypass concept was converted from a doctrine requiring personal waiver by the defendant to a rule retroactively elevating the possibly negligent or inadvertent omissions of counsel to the exalted realm of dazzling strategic maneuvers whose Darrowesque brilliance not only perversely backfires against the accused in state court, but also annihilates access to the federal habeas court, notwithstanding defendant's total unawareness of counsel's virtuoso nonperformance. It will then analyze the possible institutional repercussions of the *Sykes* case, in terms of the desirability of maintaining federal habeas as a safety valve, the urgency of developing a meaningful body of law concerning effective assistance of counsel, the implications of restricting habeas in a manner that leaves federal rights and remedies in a skewed relationship, and the potential danger of preserving habeas as a

11. 433 U.S. 72 (1977).

12. *Id.* at 90-91. Although these concepts had been introduced four years earlier in Davis v. United States, 411 U.S. 233, 244-45 (1973), the Court in *Sykes* left for future cases the task of giving "precise content" to the terms. *See* 433 U.S. at 91.

13. *See* 433 U.S. at 89.

14. *See id.* at 91 n.14; *id.* at 91-94 (Burger, C.J., concurring).

mechanism devoted almost exclusively to remedying gross constitutional violations.

I. *FAY v. NOIA* AND DELIBERATE BYPASS: NOW YOU SEE IT, NOW YOU DON'T

A. IN THE BEGINNING: "THE CONSIDERED CHOICE OF THE PETITIONER"

The pre-*Noia* case law has been analyzed extensively and intensively.[15] *Noia* thus provides a convenient starting point, not only because of this comprehensive literature, but also because it represents the first attempt by the Court to provide a coherent doctrinal solution to the problem of the effect of state procedural defaults on the availability of federal habeas relief.[16]

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15. *See, e.g.*, Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 (1961); Hart, *The Supreme Court, 1958 Term — Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 101-25 (1959); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961). *See also* Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966).

For discussions of *Noia* and its implications, see Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895, 958-79 (1966); Note, *Federal Habeas Corpus for State Prisoners: The Isolation Principle*, 39 N.Y.U. L. REV. 78, 81-104 (1964) (student work written by Professor Abraham Sofaer).

16. Professor Reitz described the pre-*Noia* judicial rules on procedural default as follows:

> There could be no more certain sign that the present judicial response to the abortive state proceeding is unsound than the confusing babble of reasons variously given to justify the result. The problem has been before the Supreme Court of the United States in two major cases, *Daniels v. Allen* and *Irvin v. Dowd*. Whatever else may be said of the many opinions filed in those cases, they demonstrate beyond any doubt that there is no acceptable unifying rationalization for the present state of the law.

Reitz, *supra* note 15, at 1317 (footnotes omitted). In *Daniels v. Allen*, consolidated with Brown v. Allen, 344 U.S. 443 (1953), petitioners were convicted of murder and sentenced to death by a North Carolina court. Because defendants' counsel filed the appeal one day late, the state supreme court refused to hear the case. In an ambiguous opinion, the Supreme Court of the United States described this as a "failure to appeal" and, utilizing a theory either of waiver or of failure to exhaust state remedies, *id.* at 485-87, or perhaps invoking the adequate state ground rule, *id.* at 458; *see* Fay v. Noia, 372 U.S. 391, 461 (1963) (Harlan, J., dissenting), the Court concluded that federal habeas relief was unavailable.

The confusion was increased by the Court's decision in Irvin v. Dowd, 359 U.S. 394 (1959). As in *Daniels*, defendant was convicted in state court of murder and was sentenced to death. There had been widespread pretrial publicity and an enflamed community attitude against Irvin, apparently contaminating the jury itself. Defendant escaped from jail the day before his counsel filed a motion for a new trial, which was denied by the trial judge on the ground that Irvin was a fugitive. The denial was

Noia arose in the following factual context. Solely on the basis of their signed confessions, Noia and two codefendants were convicted of felony murder after trial in state court.[17] The codefendants appealed and ultimately secured release based on the determination that their confessions had been coerced.[18] Because Noia failed to take a direct appeal from the judgment of conviction,[19] his subsequent efforts to obtain collateral relief in state court were unsuccessful.[20] He then commenced a federal habeas action, in which the district court conducted a hearing to ascertain the reasons for Noia's original failure to pursue state appellate remedies. The resulting testimony indicated that, although Noia knew he had a right to appeal, he declined to do so because of the expense and the apprehension that a successful appeal and subsequent retrial might result not only in conviction but in imposition of the death penalty.[21] The spectre of capital pun-

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assigned as error on an appeal to the Indiana Supreme Court, which, in affirming the conviction, rendered a highly ambiguous opinion, prominently noting the procedural bar created by the escape, but also mentioning that, "because of the finality of the sentence in the case we have reviewed the evidence to satisfy ourselves that there is no miscarriage of justice in this case." Irvin v. State, 236 Ind. 384, 392-93, 139 N.E.2d 898, 902, *cert. denied*, 353 U.S. 948 (1957). The state's highest court thus concluded that Irvin had not been denied due process of law. *Id.*

Upon review of the federal courts' refusal to grant habeas relief, the majority of the United States Supreme Court held that the state court decision was on the merits and that defendant had consequently satisfied the requirement of exhaustion of state remedies, thus allowing consideration of Irvin's constitutional claims by the federal habeas court on remand. *See* 359 U.S. at 403-07. The dissenting Justices believed that the adequate state ground rule precluded habeas relief, but suggested that, in view of the ambiguity of the state court opinion, the case should be remitted thereto for clarification. *See id.* at 411 (Frankfurter, J., dissenting); *id.* at 416-17 (Harlan, J., dissenting). The fortuity seized upon by the majority, namely that the state court had made some reference to the merits, plainly did not resolve the key question of the effect to be given state court procedural defaults where the state court was unwilling to consider the merits at all.

17. 372 U.S. at 395. Noia was convicted in 1942.

18. Codefendant Caminito secured relief in 1955. United States *ex rel.* Caminito v. Murphy, 222 F.2d 698 (2d Cir.), *cert. denied*, 350 U.S. 896 (1955). Bonino, the other codefendant, was granted relief in state court a year after Caminito's success in federal court. People v. Bonino, 1 N.Y.2d 752, 135 N.E.2d 51, 152 N.Y.S.2d 298 (1956) (mem.). The earlier direct appeals of the two codefendants had resulted in affirmances of their judgments of conviction, People v. Bonino, 291 N.Y. 541, 50 N.E.2d 654, 38 N.Y.S.2d 1019 (1943), *aff'g per curiam* 265 App. Div. 960, 38 N.Y.S.2d 1019 (1942) (mem.), notwithstanding the Second Circuit's subsequent characterization of the methods employed to elicit the confessions as "satanic practices" that "do not comport with the barest minimum of civilized principles of justice." United States *ex rel.* Caminito v. Murphy, 222 F.2d 698, 701 (2d Cir.) (Frank, J.), *cert. denied*, 350 U.S. 896 (1955).

19. 372 U.S. at 396 n.3.

20. People v. Caminito, 3 N.Y.2d 596, 148 N.E.2d 139, 170 N.Y.S.2d 799, *cert. denied*, 357 U.S. 905 (1958).

21. 372 U.S. at 396 n.3.

ishment was, in view of the trial judge's comments at sentencing, not chimerical.[22] Notwithstanding the state's stipulation that Noia's confession was in fact coerced,[23] the district court found that petitioner's failure to appeal prohibited relief under the federal statutory requirement that state remedies be exhausted, even though such remedies were no longer available.[24]

The Supreme Court, in an opinion by Justice Brennan,[25] rejected all of the state's variant arguments that the single procedural default precluded federal habeas relief. The Court interpreted the exhaustion requirement as applicable only to currently existing state remedies, and, more important, it held that although the adequate and independent state ground rule might preclude direct appellate review by the Supreme Court, it would not bar a federal habeas action.[26]

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22. *Id.* at 396 n.3, 440. The trial judge told Noia at sentencing,

> "I have thought seriously about rejecting the recommendation of the jury in your case, Noia, because I feel that if the jury knew who you were and what you were and your background as a robber, they would not have made a recommendation. But you have got a good lawyer, that is my wife. The last thing she told me this morning is to give you a chance."

Id. at 396 n.3. Noia's confession included a statement that he had committed the shooting. Although the jury had recommended life imprisonment, the judge was not required to accept its recommendation.

23. *Id.* at 396 n.2.

24. United States *ex rel.* Noia v. Fay, 183 F. Supp. 222 (S.D.N.Y. 1960), *rev'd*, 300 F.2d 345 (2d Cir. 1962) (exceptional circumstances of Noia's case warranted habeas relief), *aff'd*, 372 U.S. 391 (1963).

25. Justice Brennan wrote for himself and five other members of the Court, only one of whom, Justice White, remains on the Court today. The primary dissenting opinion was written by Justice Harlan, who was joined by Justices Stewart and Clark. Justice Clark also wrote a brief separate dissent.

26. *See* 372 U.S. at 398-99. The Court asserted that the adequate state ground rule was a barrier only to direct appellate review by the Supreme Court. The Court's appellate jurisdiction over state court cases is dependent, *inter alia*, on the existence of a state court judgment. Thus, if the Supreme Court attempts on direct appeal to resolve a federal question notwithstanding the presence of a dispositive state ground, such an interpretation of federal law would have no effect on the judgment and might therefore constitute an advisory opinion. Habeas, however, is an original proceeding to test the validity of the prisoner's detention and consequently does not require the existence of a state court judgment to confer jurisdiction. The Court in *Noia* therefore reasoned that in a federal habeas proceeding any action with respect to the writ affected only the body of the petitioner and that, accordingly, the adequate state ground rule was inapplicable. Furthermore, the majority stated that, as a matter of policy, the state's valid interest in assuring adherence to its procedures was satisfied by the forfeiture of all state remedies and of direct Supreme Court review as a result of the procedural default. The additional loss of federal habeas remedies was considered to be unwarranted. *See id.* at 428-33.

Also rejected was the state's argument that Noia's failure to appeal was a waiver of his right to do so. *See id.* at 399. The waiver, exhaustion, and adequate state ground arguments may be viewed as alternative means of labeling the legal consequences of the single procedural default.

At the same time, in keeping with the equitable nature of the writ, the majority recognized that federal judges possessed "a limited discretion" to deny relief to petitioners who had "deliberately bypassed the orderly procedure of the state courts and . . . forfeited . . . state court remedies."[27] The test for a determination of deliberate bypass was stated unequivocally to be the *Johnson v. Zerbst* waiver definition, which required " 'an intentional relinquishment or abandonment of a known right or privilege.' "[28] Although pointing out that, "after consultation with competent counsel," a defendant could, for "strategic, tactical, or any other reasons," commit such a bypass, the Court took pains to specify that "the considered choice of the petitioner" was controlling.[29]

Applying the deliberate bypass standard to the facts of the case, Justice Brennan found "the grisly choice" afforded Noia—life imprisonment versus a possible retrial and death sentence—did not amount to a "merely tactical or strategic litigation step, or in any way a deliberate circumvention of state procedures."[30] The conclusion that Noia had not engaged in such a bypass raises serious questions as to the meaning of that term.[31] Noia knew of his constitutional right not to be convicted on the basis of a coerced confession and of his right to appeal on the basis of that constitutional claim, but he nevertheless made what can only be described as a tactical or strategic decision not to pursue this state remedy because of the possible adverse

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As a final argument, New York urged that a defaulting prisoner had been given all the process constitutionally due and thus was not restrained in violation of the Constitution. Such a defendant was being held in custody as a result of the default rather than the constitutional violation. These contentions were rejected on the grounds that they misconceived the scope of due process, which included not only the right to be heard but also the specific guarantees of the Bill of Rights, and that the default did not eliminate the underlying constitutional claim. *See id.* at 427-28.

27. *Id.* at 438. Justice Brennan also referred to the "exigencies of federalism" as a basis for establishing the deliberate bypass rule. *Id.* at 433. Where, however, the state courts have proceeded to decide defendant's constitutional claim on the merits notwithstanding his or her procedural default under state law, the deliberate bypass limitation on federal habeas has not been applied, since in such cases there has been no forfeiture of state remedies, and thus neither the federalism nor the equity rationale requires imposition of a forfeiture. *See, e.g.*, Lefkowitz v. Newsome, 420 U.S. 283, 292 n.9 (1975); Warden v. Hayden, 387 U.S. 294, 297 n.3 (1967).

28. 372 U.S. at 439 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

29. *Id.* It is unclear what "other reasons," in addition to strategic and tactical considerations, Justice Brennan had in mind as a basis for a finding of deliberate bypass. Such "other reasons" would presumably have to afford some possible advantage to defendant.

30. *Id.* at 440.

31. In his dissenting opinion, Justice Harlan analyzed the application of the deliberate bypass test to Noia and concluded that the majority "in effect reads its own creation out of existence." *Id.* at 471.

consequences.[32] His decision was thus tactical, but evidently not "merely tactical."[33] It was not "merely tactical" because the state procedure permitting harsher punishment on retrial, though constitutional at that time,[34] discouraged presentation of federal constitutional claims in state court;[35] or because Noia was perhaps unaware that failure to appeal could result in a complete forfeiture of both federal and state collateral remedies for vindication of his constitutional claim;[36] or because the defendant had at least asserted his coerced confession claim at trial, thus giving the state an initial opportunity to vindicate the federal claim.[37] Whatever reason prompted

32. *Id.* at 396 n.3.

33. *Id.* at 440.

34. It was not until six years after its *Noia* decision that the Supreme Court held that the due process clause prohibited the states from imposing vindictively harsher punishments upon defendants who secured appellate reversals and were convicted after retrial. *See* North Carolina v. Pearce, 395 U.S. 711 (1969). Indeed, in the *Noia* opinion the Court stated that the possibility of harsher punishment in and of itself would not preclude a finding of deliberate bypass. The significant distinguishing factor in *Noia* was that the trial judge's comments at sentencing created a very substantial possibility of imposition of the death penalty in the event of retrial. *See* 372 U.S. at 440.

The Court's reliance on the sentencing judge's comments seems inappropriate. Since the only items of evidence presented against Noia and his confederates were the coerced confessions, a finding that those confessions were invalid would appear to have precluded successful retrial. Even if the state had been able to secure other, untainted evidence against Noia, he could presumably have moved successfully to have his case retried before another judge on the basis of the comments made by the original judge at the sentencing proceeding. In any event, such fastening on the happenstance of a garrulous trial judge seems somewhat reminiscent of the Court's seizing upon the ambiguity of the state court opinion in Irvin v. Dowd, 359 U.S. 394 (1959), *discussed at* note 16 *supra.* Such slips of tongue or pen seem to be inappropriate bases for doctrinal resolution of the difficult problems presented.

35. *See* Note, *supra* note 15, at 89.

36. Nothing in the Court's opinion suggests either that Noia had such knowledge or that it was a prerequisite for a finding of deliberate bypass. It is conceivable, however, that, by focusing on the *Johnson v. Zerbst* standard of waiver, the Court intended to require that the prisoner not only knowingly give up the particular state remedy for vindication of a constitutional claim, such as appeal, but also that he or she understand the collateral consequences of such a default.

37. The Supreme Court may have believed that the defendant's default with respect to an appellate remedy was less consequential than a default at the trial level. When a defendant fails to make any objection in the course of trial, the state has no opportunity at the trial level to correct an alleged violation of constitutional rights and thus to avoid the possibility of a subsequent retrial in the event of appellate reversal on the constitutional ground. In such instances, it is arguable that the state's interest in imposition of a forfeiture should be given greater weight. If, however, defendant does assert a constitutional claim at trial and it is erroneously rejected, but the defendant thereafter fails to appeal, the state's insistence that the prisoner utilize the more refined appellate procedure for rectifying the error of the trial court and its demand for a forfeiture of federal remedies are less compelling since defendant has at least

the Court to find no deliberate bypass on the basis of these facts, it is clear that the standard imposed for determining the availability of habeas was a liberal one, intended to allow maximum federal review of the constitutional claims of defaulting state prisoners.

The reason for such leniency may well lie in the difference between a true *Johnson v. Zerbst* waiver and a deliberate bypass of the *Fay v. Noia* variety. Although these concepts have the same effect and were used interchangeably by the *Noia* Court, there are significant differences.[38] In the waiver situation, although the defendant initially had a particular constitutional right, it has been determined, after a hearing on the merits, that he or she affirmatively gave up that right, so that one can say with some confidence that the defendant is not being held in violation of the Constitution and that federal habeas relief should accordingly be unavailable.[39] In the deliberate bypass context, however, defendant has allegedly lost the right to assert the constitutional claim because of a procedural default. Since there has been no hearing on the merits of that claim, the court has no way of knowing whether the defendant is being held in violation of the Constitution.[40] Thus, because the merits can never be reached

given the original state tribunal the opportunity to remedy the constitutional defect and thus to avoid the necessity of retrial. *Compare* Davis v. United States, 411 U.S. 233, 240 n.7 (1973), *with* Kaufman v. United States, 394 U.S. 217 (1969).

For the reasons set forth at notes 344-49 *infra* and accompanying text, however, this distinction between trial and appellate defaults as a means of assessing the availability of federal habeas relief appears to be inappropriate.

38. *See* Estelle v. Williams, 425 U.S. 501, 523-25 (1976) (Brennan, J., dissenting).

39. For example, if a defendant gives an inculpatory statement to the police following his or her arrest and thereafter, either through a pretrial motion to suppress or an objection at trial, challenges the introduction of the statement on the ground that there was no voluntary waiver of the fifth amendment right against self-incrimination, a hearing is required to determine the voluntariness of the confession. *See* Jackson v. Denno, 378 U.S. 368 (1964). After such a hearing, the trial court may find that the police advised defendant in accordance with Miranda v. Arizona, 384 U.S. 436 (1966), and that defendant, being aware of his or her rights, intelligently and voluntarily gave up the right against self-incrimination. If defendant is subsequently convicted at a trial at which the confession is introduced and if he or she thereafter files a federal habeas action alleging that he or she is in custody in violation of the Constitution on the basis of the involuntary confession claim, the state court record resolving the voluntariness issue against the defendant will be presumed correct if it meets the criteria of 28 U.S.C. § 2254(d)-(e) (1970). Thus, habeas relief will be unavailable because there has been a fair and adequate resolution on the merits of the factual dispute underlying the constitutional claim and a finding that defendant voluntarily relinquished ("waived") the constitutional right in question.

For a comprehensive discussion of waiver and its doctrinal variants, see Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193 (1977).

40. For instance, if a defendant who has rendered an inculpatory statement to police following arrest makes no objection to admission of the confession at trial, it is unclear whether defendant's failure to object is based on (1) a knowing and intelligent

in the deliberate bypass situation, it is eminently reasonable that the Court should be equally or more zealous in assuring an intelligent relinquishment of the right to assert the constitutional claim in the latter context. By requiring the state to establish an intentional, tactical default carried out with the defendant's personal participation, the deliberate bypass rule set forth in *Noia* attempted to achieve that result.

B. EARLY AMBIVALENCE: IMPUTING THE "CONSIDERED CHOICE" TO THE PETITIONER

Two years after *Noia*, the Court provided in *Henry v. Mississippi*[41] what would ultimately become a theoretical framework

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acknowledgment of the voluntariness of the out-of-court confession; or (2) a determination that, although involuntary, the statement is helpful to the accused; or (3) a decision that, although the statement is involuntary, the trier of fact will disbelieve defendant's version of the disputed facts relating to this claim and that it is therefore a waste of time to object to its introduction; or (4) a mistake on the part of defense counsel in assessing the legal consequences of facts underlying the constitutional claim, for instance, counsel does not understand that deceit or psychological coercion renders the confession involuntary; or (5) defendant's and defense counsel's ignorance of facts indicating that the confession was involuntary, for example, unknown to defendant at the time he or she made the statement, the police had administered a "truth serum"; or (6) ignorance or negligence in failing to understand that an objection is the appropriate procedural mechanism for challenging the admission of an involuntary confession; or (7) an intention not to permit the state courts to resolve the disputed facts and instead to litigate these facts in federal court. Whatever the reason for defendant's default, the net effect is that the court cannot know whether the confession is in fact voluntary since no hearing on the merits of the voluntariness claim is ever held. If such a defendant subsequently brings a federal habeas action and claims that he or she is being detained in violation of the Constitution because the conviction is based on an involuntary confession, a finding of deliberate bypass will make it impossible to ascertain whether the confession was in fact involuntary.

Assuming that defendant has personally participated in the decision, has received the advice of competent counsel, and is aware of all the legal consequences of the default, a finding of deliberate bypass does not appear inequitable in situations 1 and 2 given above. Even making the above assumptions, a bypass finding seems less appropriate in situation 3 since there appears to be no strategic or tactical basis for the default. In situations 4, 5, and 6, a finding of deliberate bypass seems clearly improper, since there is no intent to circumvent state remedies, there is no strategic or tactical basis for the default, and competency of counsel may be in doubt. Finally, although situation 7 might appear to be a classic case of deliberate bypass, it seems clear that competent counsel would never advise a client to proceed on that basis since failure to present the claim in state court increases the possibility of conviction and results in a forfeiture of both state and federal remedies as well. Therefore, no finding of deliberate bypass should be made in situation 7. The deliberate bypass test thus appears to be an appropriate mechanism for limiting forfeiture of federal habeas remedies to those situations in which the defendant's statement is in fact voluntary or in which defendant's failure to utilize the state procedure is intentional and is carried out in a reasonable effort to gain some strategic or tactical benefit.

41. 379 U.S. 443 (1965).

for dilution of the deliberate bypass requirement in the course of an apparent attempt to circumscribe the adequate and independent state ground rule as a barrier to direct review of cases involving procedural defaults. The defendant, a black civil rights leader,[42] was convicted of disturbing the peace by making indecent proposals to a teenage hitchhiker to whom the accused allegedly gave a ride. Under Mississippi law, Henry could not be convicted on the basis of the uncorroborated testimony of the complaining witness. To corroborate the hitchhiker's testimony describing the interior of defendant's car, the state called as a witness a police officer who had inspected the automobile after obtaining consent from Henry's wife.[43]

State law required that objections to illegally obtained evidence be made contemporaneously with the introduction of the evidence. When the police officer testified, Henry's attorneys made no such objection, but at the conclusion of the state's case they moved for a directed verdict and included as a ground the claim that the police officer's search of the car violated the fourth amendment.[44] The Mississippi Supreme Court initially reversed the conviction, on the ground that defendant's nonresident attorneys were unfamiliar with the contemporaneous objection rule. On rehearing,[45] however, after being advised that defendant had also been represented by local counsel, the court filed a new opinion reinstating the judgment of conviction and ruling that honest mistakes of counsel were binding on the client.[46]

On appeal, the United States Supreme Court first considered whether failure to comply with the Mississippi procedural rule was an adequate state ground barring direct review. Although acknowledging that the contemporaneous objection rule served a legitimate state interest, the Court suggested that if defendant's motion for directed verdict served the same interest, "settled principles would preclude treating the state ground as adequate."[47] Notwithstanding

42. *See* Henry v. Williams, 299 F. Supp. 36, 40 (N.D. Miss. 1969).

43. The police officer testified, as had the complainant, that the ashtray was filled with chewing gum wrappers and that the cigarette lighter did not work. *See* 379 U.S. at 444.

44. The underlying fourth amendment claim was that the defendant should not be bound by his spouse's consent to a search. *Id.* at 449 n.6. *But cf.* United States v. Matlock, 415 U.S. 164 (1974) (woman who cohabited with defendant and who had made statements that she and defendant were married had authority to consent to search of bedroom).

45. Technically, under the Mississippi Supreme Court Rules, this was a "suggestion of error," *see* MISS. SUP. CT. R. 14, *reprinted in* 29 MISS. L.J. 386 (1958), which is the functional equivalent of a rehearing, *see* White v. State, 190 Miss. 589, 595, 195 So. 479, 482 (1940).

46. Henry v. State, 253 Miss. 263, 280, 154 So. 2d 289, 296 (1963), *vacated and remanded*, 379 U.S. 443 (1965).

47. 379 U.S. at 449. There is some doubt as to how "settled" these "principles" were. *See id.* at 464 (Harlan, J., dissenting); P. BATOR, P. MISHKIN, D. SHAPIRO, & H.

these pronouncements, the Court declined to pass on the adequacy of the state ground or on the merits of the underlying fourth amendment claim because the record suggested "a possibility that petitioner's counsel deliberately bypassed the opportunity to make timely objection in the state court, and thus that the petitioner should be deemed to have forfeited his state court remedies."[48] Accordingly, the case was remanded to the state court for a hearing on the deliberate bypass issue.[49]

In a seemingly unambiguous fashion, Justice Brennan carved an exception to the personal participation requirement of the deliberate bypass rule:

> Although trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims, . . . we think that the deliberate bypassing by counsel of the contemporaneous-objection rule as a part of trial strategy would have that effect in this case.[50]

WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 557 (2d ed. 1973) [hereinafter cited as HART & WECHSLER]; Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943, 987-92 (1965).

48. 379 U.S. at 450.

49. Justice Brennan reasoned that even the Court's dismissal of the appeal on the basis of the adequate state ground rule would not end the matter since Henry could then seek federal habeas relief. The opinion suggested that remanding to the state court would permit the latter to make the initial determination of the deliberate bypass issue and might thus possibly reduce federal-state friction and promote the efficient administration of criminal justice. *See id.* at 452-53.

On remand, the Mississippi Supreme Court found that by virtue of his attorney's failure to object defendant had committed a "waiver." *See* Henry v. State, 198 So. 2d 213 (Miss. 1967). Henry thereafter filed a federal habeas petition, which was granted on the merits after the court found that there had been no deliberate bypass. Henry v. Williams, 299 F. Supp. 36 (N.D. Miss. 1969).

50. 379 U.S. at 451-52. Although this statement in effect opened the door to dilution and ultimately to elimination of *Noia*'s requirement of personal participation by the defendant with respect to trial defaults, *see* Wainwright v. Sykes, 433 U.S. 72, 91 n.14 (1977), the Court's opinion limited such waivers by counsel alone to intentional, strategic decisions to bypass the contemporaneous objection rule. *See* 379 U.S. at 451-52. Moreover, an argument can be made that Justice Brennan was intimating that a default by counsel alone as part of trial strategy would bar only direct appellate review of the underlying constitutional claim by the state court and by the United States Supreme Court, but would not preclude federal habeas corpus relief without petitioner's personal participation. Despite Justice Brennan's seemingly unequivocal statement that counsel could bind the client without the latter's participation, the immediately preceding sentence of the opinion stated that this binding omission by counsel would preclude petitioner "from a decision on the merits of his federal claim either in the state courts or here," *id.* at 451, omitting any reference to the effect of such a default for purposes of federal habeas corpus. Furthermore, in the next paragraph, when discussing the possibility that Henry might thereafter pursue such federal collateral remedies, the opinion stated that "the procedural default will not alone

Justice Brennan noted two indications in the record justifying an evidentiary hearing with respect to whether counsel committed such a bypass: (1) the prosecution's proposal to the Mississippi Supreme Court that it would confess error on the waiver issue if any of petitioner's three attorneys would submit an affidavit " 'that he did not know that at some point in a trial in criminal court in Mississippi

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preclude consideration of his claim, at least unless it is shown that *petitioner* deliberately bypassed the orderly procedure of the state courts." *Id.* at 452 (emphasis added).

In view of *Noia*'s unequivocal requirement of personal participation and its exposition of the deliberate bypass doctrine as one of limited discretion (thus authorizing the federal district court to proceed to the merits notwithstanding a finding of deliberate bypass), and in view of the fact that *Henry* was a direct appeal, Justice Brennan may have intended to create different standards for establishing a bypass for purposes of direct appeal as opposed to habeas. This position is given some support by the discussion in *Noia* of the differences between the Supreme Court's appellate jurisdiction and the habeas jurisdiction of the lower federal courts. On the one hand, direct appeal to the Supreme Court can be viewed as an appellate stage of the state criminal prosecution, in which the Court must accordingly confine itself to the record made below, including any procedural default, without being able to ascertain independently whether defendant participated in such a default. By contrast,

> the traditional characterization of the writ of habeas corpus as an original . . . civil remedy for the enforcement of the right to personal liberty, rather than as a stage of the state criminal proceedings or as an appeal therefrom, emphasizes the independence of the federal habeas proceedings from what has gone before.

Fay v. Noia, 372 U.S. 391, 423-24 (1963) (footnote omitted). In these independent collateral proceedings, the federal court is free to take evidence concerning defendant's participation in the default.

The Court's statement in *Noia* that a state prisoner need not petition for certiorari prior to commencement of a federal habeas action, *id.* at 435, arguably suggests that direct review by the Supreme Court is not a traditional appellate stage of the state criminal proceeding, since habeas actions can only be commenced after the exhaustion of state appeal procedures. The foregoing determination, however, was largely based on pragmatic considerations, such as the discretionary nature of the writ of certiorari and the need to conserve judicial resources. *See id.* at 436-37. When the Court does grant certiorari, it is clearly performing an appellate function, and its resolution of the matter is inextricably tied to the proceedings below.

Finally, it should be noted that, after the Mississippi Supreme Court in effect found a bypass on remand, the Court denied certiorari "without prejudice to the bringing of a proceeding for relief in federal habeas corpus," Henry v. Mississippi, 392 U.S. 931, 931 (1968), *denying cert. to* 202 So. 2d 40 (Miss. 1967), and that the federal habeas judge from whom Henry ultimately secured relief questioned the applicability of the Supreme Court's decision in *Henry v. Mississippi* concerning the requirement of personal participation since the latter decision was on direct appeal and its statements regarding waiver by counsel alone were in conflict with *Noia* in that regard. *See* Henry v. Williams, 299 F. Supp. 36, 48 n.26 (N.D. Miss. 1969); *cf.* Henry v. Mississippi, 379 U.S. 433, 448 n.3 (1965) ("[W]here the state rule is a reasonable one and clearly announced to *defendant and counsel*, application of the waiver doctrine will yield the same result as that of the adequate nonfederal ground doctrine in the vast majority of cases.") (emphasis added).

that an objection to such testimony must have been made' ";[51] (2) an affidavit attached to the state's brief in the United States Supreme Court alleging that one of Henry's attorneys "stood up as if to object to the officer's tainted testimony and was pulled down by co-counsel."[52] In pointing to the first factor, the Supreme Court appeared to be saying that counsel's awareness of the state procedural rule, although not conclusive, was a matter to be considered in determining whether the contemporaneous objection rule had been deliberately bypassed. Conversely, the Court also seemed to accept the view that ignorance of the state rule would preclude such a finding. The second item—the "jerk on the coat tail" affidavit[53]—seemed to be viewed as evidence bearing on counsel's knowledge of the state rule, or perhaps suggesting a tactical maneuver,[54] and as a sufficient basis, together with the first indication, to justify a hearing on the deliberate bypass question.

Having determined that the foregoing matters brought counsel's ignorance of the state rule into question, the Court proceeded to suggest two reasons why counsel's failure to object might have been strategically motivated. First, counsel might have permitted introduction of the evidence in question so that it could be impeached by a defense witness, thus securing an acquittal.[55] Second, by delaying their objection, Henry's attorneys might have been inviting error for

51. Henry v. Mississippi, 379 U.S. 443, 450 (1965) (quoting the state's brief on suggestion of error in lower court case). The Mississippi Supreme Court did not refer to the state's proposal in its opinion. *Id.* In the subsequent federal habeas proceeding, Henry's local counsel testified that, at the time the allegedly tainted testimony was introduced, he was preoccupied with another matter, *see* Henry v. Williams, 299 F. Supp. 36, 41 (N.D. Miss. 1969); there was also testimony that the failure to make a contemporaneous objection was based on a misconception with respect to state law, *see id.* at 48-49.

52. 379 U.S. at 450. At Henry's federal habeas hearing, the attorney who had risen at the unpropitious moment testified that he did so in order to obtain ice water from the judge's bench. He also testified that, at the trial, it was extremely hot and pitchers of ice water were provided for the judge and the district attorney, whereas defense counsel were advised that they could use a "for colored only" fountain outside the courtroom. Henry v. Williams, 299 F. Supp. 36, 41 (N.D. Miss. 1969).

53. *See* 379 U.S. at 454 n.2 (Black, J., dissenting).

54. *But see id.* at 454 & n.2 (Black, J., dissenting). Justice Black opposed remand of the case to the state court for a determination of the waiver issue and asserted his belief that the state's affidavit, which was filed for the first time at the Supreme Court level, afforded no basis for even a "suspicion" of waiver. *Id.* at 454 n.2.

55. *See id.* at 451. Defendant called as a witness a mechanic who had repaired the broken cigarette lighter in Henry's car. The Court suggested that defense counsel may have counted on the mechanic's testimony to contradict that of the complainant and the police officer with respect to the condition of the lighter, thereby undermining the necessary corroboration, *see* text accompanying note 43 *supra*, and convincing the jury to acquit. *See* 379 U.S. at 451.

purposes of securing reversal on appeal. Justice Brennan concluded that "[i]f either reason motivated the action of petitioner's counsel, and their plans backfired, counsel's deliberate choice of the strategy would amount to a waiver binding on petitioner and would preclude him from a decision on the merits of his federal claim either in the state courts or here."[56]

This entire conjectural discussion of what evidence might be sufficient to justify a finding of deliberate bypass by the attorney, although occurring in a case on direct appeal, nevertheless marks a clear retreat from *Noia*'s requirement of personal participation by the defendant.[57] Moreover, the significance of the retreat is enhanced by the fact that defense counsel was aware of the search in advance of trial[58] and thus could have discussed the crucial decision concerning assertion of the fourth amendment claim with Henry prior to trial.[59] That the assertion was required to be made pursuant to a contemporaneous objection rule merely obfuscates the nature of the decision-making process involved.[60]

Furthermore, *Henry* may also have provided another part of the analytical framework for later decisions eviscerating *Noia* because it appears to sanction searches of the trial court record for any evidence that might conceivably suggest a tactical or strategic maneuver by counsel warranting a bypass determination. The fair import of Justice Brennan's discussion was merely that the record be inspected to ascertain whether any possible basis for a strategic decision was present; the finding of such a basis would then trigger a hearing to determine whether in the particular case counsel's action was in fact strategically motivated. Later decisions, however, dropped the second phase of the procedure for determining bypass, making the initial determination as to the existence of any theoretical strategic or tactical basis dispositive.[61]

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56. 379 U.S. at 451.

57. In the subsequent federal habeas proceeding, the state stipulated that Henry himself had not waived his fourth amendment rights. Henry v. Williams, 299 F. Supp. 36, 48 (N.D. Miss. 1969). The evidence proffered at the hearing indicated that Henry did not participate in defense strategy. *Id.* at 41.

58. Henry was originally tried before and convicted by a justice of the peace, at which time the police officer did not testify concerning the car search. On the evening before the trial de novo in a higher court, however, defendant's attorneys discussed the search with Henry's wife. *Id.*

59. Even if the matter had been discussed with Henry, a finding of deliberate bypass might still have been inappropriate in this case because counsel clearly intended to make a fourth amendment objection and their failure to do so at the proper time was apparently based on a misconception with respect to state law. *See* note 51 *supra.*

60. *See generally* text accompanying notes 283-304 *infra.*

61. *See* Francis v. Henderson, 425 U.S. 536, 540-41 (1976); Davis v. United States, 411 U.S. 233, 241 (1973).

C. Intermediate Backing and Filling

Taken together, *Noia* and *Henry* may be construed in a variety of ways. If one considers the apparent breadth of the *Noia* decision and the Court's general expansion of the due process rights of defendants in criminal cases during the Warren era, *Henry* can be viewed as having no effect on the deliberate bypass test for purposes of habeas since it was a direct appeal. Alternatively, it can be seen as engrafting only a minor contemporaneous objection exception on *Noia*'s general requirement that the client personally participate in the default,[62] or as an example of overreaching by a liberal Court intent on doing justice in a particular case by attempting to restrict the adequate state ground rule as a barrier to direct review by the Supreme Court.[63] On the other hand, if *Henry* is read broadly, it arguably limits *Noia*'s requirement of personal participation by the defendant to posttrial defaults. If that is the appropriate reading, any deliberate tactical decision to bypass a state procedure for the vindication of a constitutional right made by counsel during trial may be binding on the defendant.[64]

The 1969 decision in *Kaufman v. United States*[65] can be interpreted to support either position. *Kaufman* expanded federal habeas by holding that federal prisoners seeking relief pursuant to 28 U.S.C. § 2255 were entitled to collateral review of fourth amendment claims.[66] In addition, a bypass issue was presented. Defendant had

62. Such an exception would be minor if it were applicable only to true contemporaneous objections—those that must be made by counsel on the spur of the moment during trial, with no opportunity to discuss them beforehand with the accused. *See generally* notes 283-304 *infra* and accompanying text.

63. It is fair to say that, in view of subsequently decided cases, *Henry* has not effected any dilution of the adequate state ground rule as a barrier to direct review. *See* HART & WECHSLER, *supra* note 47, at 558 ("Decisions in the years following have done little to clarify Henry or reinforce its authority. Most appear to have ignored it, even when it would have been relevant.").

As a result of the present Court's more restrictive interpretations of due process, the adequate state ground rule is currently being viewed with considerably greater enthusiasm by Justices Brennan and Marshall, who have stated that the majority may be overreaching by deciding cases that rest on state as well as federal grounds, *see* Oregon v. Hass, 420 U.S. 714, 726-29 (1975) (Marshall, J., dissenting), and who have pointed out that state courts are empowered to impose more exacting standards of due process under state law and that, if they do so, the adequate state ground rule will bar Supreme Court review, *see* Michigan v. Mosley, 423 U.S. 96, 120-21 (1975) (Brennan, J., dissenting). *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

64. Such an interpretation of *Noia* and *Henry* is given in the concurring opinion of Chief Justice Burger in Henderson v. Kibbe, 431 U.S. 145, 157 (1977).

65. 394 U.S. 217 (1969).

66. *Id.* at 231. There is considerable doubt as to the continuing vitality of the holding in *Kaufman* after the Court's decision in Stone v. Powell, 428 U.S. 465, 481 n.16 (1976).

asserted a search and seizure objection at trial and it was overruled. Newly appointed counsel did not brief or argue this claim on appeal. After oral argument, petitioner requested in a letter to his attorney that the fourth amendment issue be included as a ground for reversal. The attorney merely forwarded this letter to the court of appeals.[67] The Supreme Court found that the failure to argue the fourth amendment claim did not constitute a deliberate bypass,[68] but its rationale for doing so is unclear. First of all, the default may have been inadvertent.[69] If such was the case, then *Kaufman* may stand for no more than the proposition that an attorney's acts must be deliberate to constitute a bypass.[70] It is more likely, however, that the default was

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In *Powell*, the Court held that where a state has provided an opportunity for full and fair litigation of fourth amendment claims, federal habeas will thereafter be unavailable for litigation of such claims. *Kaufman* permitted federal prisoners to raise search and seizure issues in proceedings under 28 U.S.C. § 2255 (1970), *see* 394 U.S. at 231, even though the Federal Rules of Criminal Procedure provide a full and fair opportunity to assert such contentions at or before trial, *see* FED. R. CRIM. P. 12, 41(f). Since section 2255 is the functional equivalent of section 2254, *see* Sanders v. United States, 373 U.S. 1, 15 (1963), and since the Court has, at least in the context of challenges to grand jury composition, indicated that where habeas is unavailable for federal prisoners it will be unavailable for state prisoners as well, *compare* Davis v. United States, 411 U.S. 233 (1973), *with* Francis v. Henderson, 425 U.S. 536 (1976), it seems likely that the rule of *Stone v. Powell* will subsequently be applied to federal prisoners notwithstanding the Court's explicit reservation of that issue, *see* 428 U.S. at 481 n.16, and notwithstanding the absence of federalism concerns with respect to federal prisoners.

67. *See* 394 U.S. at 220 n.3.

68. *Id.*

69. This inference is possible because the fourth amendment issue had been raised at trial, new counsel had been appointed for the appeal, and the latter had failed to include this constitutional claim in his brief. *Id.*

70. It is also possible that the Supreme Court found no deliberate bypass on the theory that transmitting the prisoner's letter to the court was sufficient to preserve the issue for appellate purposes, even though the appellate court's opinion affirming the judgment of conviction did not appear to pass on the fourth amendment claim. *See id.*; Kaufman v. United States, 350 F.2d 408 (8th Cir. 1965), *cert. denied*, 383 U.S. 951 (1966).

In Smith v. Yeager, 393 U.S. 122 (1968) (per curiam), the petitioner had been convicted of murder in state court. In 1961, he sought federal habeas relief. In the course of oral argument before the district court, the petitioner's attorney suggested that, although the judge was empowered to conduct an evidentiary hearing, it was unnecessary to do so because the constitutional error involved was "overwhelming." *Id.* at 123. The district court did not hold such a hearing and, relying on the state court record, denied relief. *See* United States *ex rel.* Smith v. New Jersey, 201 F. Supp. 272 (D.N.J. 1962), *aff'd*, 322 F.2d 810 (3d Cir. 1962), *cert. denied*, 376 U.S. 928 (1964). In 1965, after the decision in Townsend v. Sain, 372 U.S. 293 (1963), mandating evidentiary hearings in instances where they had previously been discretionary, petitioner filed a new federal habeas action and requested a hearing, which was denied by the trial court. *See* 393 U.S. at 124. In reversing, the Supreme Court held that counsel in the 1961 action had not waived the right to a hearing, noting that it was doubtful

tactically motivated,[71] perhaps based on a belief that the issue was frivolous and that its inclusion would obscure more meritorious claims. If the latter is the case, *Kaufman* may stand for the proposition that a bypass will not be found absent personal participation by the defendant.[72] On the other hand, the default took place during an appeal, and *Kaufman*'s personal participation requirement is, like *Noia's*, arguably limited to that context.[73]

If one is in an expansive mood, *Humphrey v. Cady*[74] can be interpreted as requiring participation by the defendant in waivers at the trial level. The defendant had been convicted of a misdemeanor and upon a finding of need for treatment was committed to a facility for sex deviates for the one-year period authorized in the case of misdemeanors. At the end of that time, the state custodial agency petitioned for an order renewing the commitment for five years. At the resulting proceeding, after defendant's appointed counsel announced her intention to make "a broad constitutional challenge to the Sex Crimes Act,"[75] the trial judge adjourned the matter to give

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whether petitioner possessed such a right at the time and that "[w]hatever counsel's reasons for this obscure gesture of *noblesse oblige*, we cannot now examine the state of his mind or presume that he intentionally relinquished a known right or privilege." *Id.* at 126 (citation and footnote omitted).

71. If the original omission had been inadvertent, the attorney would presumably have filed a supplemental brief after Kaufman called the matter to his attention rather than merely forwarding his client's letter to the appellate court.

72. Alternatively, the Court may simply have concluded that there was no strategic basis for the failure of appellate counsel to assert the fourth amendment claim. It is also possible that counsel's failure to brief the search and seizure issue notwithstanding his client's request was viewed as an attempt by the defense attorney to waive a claim despite the client's contrary wishes. *Cf.* Brookhart v. Janis, 384 U.S. 1 (1966) (direct appeal from a state habeas corpus proceeding; Court held that counsel was not empowered to enter what was in effect a plea of guilty and carry out a waiver of the right to a trial with confrontation and cross-examination of witnesses, when such a course of action was inconsistent with the client's express desire not to plead guilty). The Court in *Brookhart* specifically rejected the contention that *Henry v. Mississippi* permitted such action on the part of counsel. *See id.* at 7-8.

73. The default in *Noia* is distinguishable, however, since it involved a complete failure to appeal rather than a failure to assert a particular claim on appeal. Thus, *Kaufman* suggests that, even where the attorney's technical expertise and professional judgment may be involved, the client's participation in the decisionmaking process is still required.

In *Kaufman*, the Court also cited both *Noia* and *Henry* for the proposition that the deliberate bypass doctrine was applicable at the pretrial, trial, and appellate levels, without stating whether all of the bypass requirements articulated in *Noia* were applicable at each level. *See* 394 U.S. at 227 n.8; *cf.* Anderson v. Nelson, 390 U.S. 523, 525 (1968) (per curiam) (state supreme court's refusal to entertain a petition for appellate relief because of late filing did not constitute a deliberate bypass precluding the federal habeas action).

74. 405 U.S. 504 (1972).

75. *Id.* at 515. The underlying constitutional challenges were based on denials

all parties time to brief these claims. When defendant's attorney failed to submit such a brief or to take any other action on her client's behalf, the trial court committed defendant on the basis of the bare allegations of the agency's petition, and no appeal was taken therefrom.[76] In the subsequent federal habeas hearing,[77] relief was denied on the ground that counsel's failure to file the state court brief constituted a deliberate bypass.[78]

The Supreme Court remanded the case for a deliberate bypass hearing[79] after reiterating that "such a waiver must be the product of an understanding and knowing decision by the petitioner himself, who is not necessarily bound by the decision or default of his counsel."[80] The Court directed the hearing to determine "(1) the reason for counsel's failure to file a brief or to take further action in the state courts, and (2) the extent of petitioner's knowledge and participation in that decision."[81] Arguably the purpose of the first of these inquiries would be to determine whether there was a strategic basis for counsel's inaction. It is difficult to imagine any conceivable advantage that might accrue from such a default, however, and it is therefore likely that this inquiry was necessitated by defendant's claim of ineffective assistance of counsel at the recommitment hearing.[82] If ineffective assistance was proved, defendant's personal participation in the decision to default could still not be considered a knowing waiver of his rights.[83]

The Court's omission of any reference to *Henry v. Mississippi* may be construed as a tacit disavowal of its imputation to defendant of waivers by trial counsel.[84] Alternatively, the absence of such a

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of trial by jury, due process, and equal protection, and on a double jeopardy claim. *See id.* at 508-12.

76. *Id.* at 515.

77. Prior to the federal habeas action, the state's highest court had summarily dismissed the prisoner's pro se petition. *Id.*

78. *Id.* at 506. In addition to its deliberate bypass finding, the federal district court denied relief on the ground that petitioner's constitutional claims lacked merit. *Id.* The Supreme Court found, however, that the prisoner's claims were substantial and warranted an evidentiary hearing. *See id.* at 508-14.

79. The Court stated that the present record was insufficient to support a bypass finding, but that the state should be afforded an opportunity to develop the relevant facts. The Supreme Court thus remanded for an evidentiary hearing with respect to both the merits and the bypass contention. *Id.* at 516.

80. *Id.* at 517.

81. *Id.* The Court made it clear that there must be "persuasive evidence of a knowing and intelligent waiver on the part of petitioner himself." *Id.*

82. *See id.* at 512.

83. The Court noted that the ineffective assistance claim was "tied inextricably to the question of possible waiver" at the commitment hearing. *See id.* at 512-13.

84. Depending upon one's perspective, the default in *Humphrey* can be considered to have occurred in the pretrial, trial, or posttrial stage of the proceedings.

citation may be attributable to the Court's belief that the default under consideration was either the equivalent of a guilty plea, rather than a contemporaneous objection default of the sort involved in *Henry*,[85] or was more akin to a posttrial appellate default than a waiver in the heat of battle. Whichever of these interpretations is more appropriate, *Humphrey v. Cady* may be viewed as the high-water mark of *Noia*'s deliberate bypass test since the Court emphatically reinjected the element of personal participation and required that evidence be taken with respect to both the possible strategic basis for the alleged bypass and the competency of counsel.

D. The Decline of *Noia* and Deliberate Bypass

Murch v. Mottram,[86] a 1972 per curiam decision of the Supreme Court, appears silently to abandon the requirement that a deliberate bypass have a strategic or tactical basis before it will preclude habeas review. It also suggests that reliance on erroneous advice provided by counsel of "unquestioned competence" with respect to state rules of procedure can be used as a basis for forfeiture of federal habeas relief. Finally, the decision makes it clear that where a defendant, even though relying on counsel's incorrect advice, personally participates in a default, the subjective intention of the accused not to circumvent state remedies will not necessarily preclude a finding of deliberate bypass.

Mottram had been convicted as a habitual offender and was paroled after serving three years in prison, but two years thereafter, his parole was revoked. In a collateral state proceeding, his attorney

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Chief Justice Burger views the case as involving "*post*-trial omissions of a technical nature." Henderson v. Kibbe, 431 U.S. 145, 158 (1977) (concurring opinion). It appears, however, that the postsentence commitment hearing, which required a finding that defendant's discharge would be dangerous to the public because of mental or physical disorders, is most properly viewed as a trial-type proceeding. Counsel's failure to submit a brief to the trial judge with respect to the constitutional challenges may be considered as either a pretrial or trial default, and her subsequent failure to take any further action in the case would also appear to constitute a trial-type default. Her failure thereafter to appeal the commitment order would amount to a posttrial default.

85. The suggestion that the default was the functional equivalent of a guilty plea is buttressed by the Court's reference to a subsequent decision by the state's highest court specifying that the prosecution had the burden of proof in such recommitment proceedings. In the instant case, the prisoner had been recommitted notwithstanding the state's failure to present any evidence supporting such action. 405 U.S. at 515 n.14. Thus, leaving aside the prisoner's constitutional claims, had counsel simply appealed on the above mentioned ground, the state appellate court may have reversed the commitment determination. *Cf.* Brookhart v. Janis, 384 U.S. 1 (1966) (counsel prohibited from waiving defendant's right to confront and cross-examine witnesses where defendant expressly stated his desire to plead not guilty).

86. 409 U.S. 41 (1972) (per curiam). The *Mottram* decision was rendered eight months after *Humphrey v. Cady*.

attempted to withdraw the original petition, which attacked an underlying conviction, and to substitute a petition challenging only the parole revocation procedures.[87] The state court judge and defense counsel disagreed as to whether state law required defendant to consolidate all his claims in the instant action, the trial judge being of the opinion that this was a statutory postconviction proceeding requiring joinder, whereas defense counsel contended that the petition was one for common law habeas corpus not governed by statutory joinder requirements.[88] The trial judge specifically advised counsel that failure to press all constitutional claims would, in his opinion, amount to a waiver. After an off-the-record conference with the defendant, counsel announced that he would proceed solely on the parole revocation issue and attempted to reserve his rights " 'as to whether or not this is a post-conviction hearing.' "[89]

The trial judge's adverse ruling on the parole revocation challenge was affirmed by the state's highest court.[90] Defendant then filed another petition seeking postconviction relief on the basis of his constitutional challenges to the underlying conviction. That action culminated in a determination by the Supreme Judicial Court of Maine that the failure to present such claims in the earlier proceeding constituted a waiver under state law.[91]

In the ensuing federal habeas action, the district court found a deliberate bypass of the Maine postconviction procedures, determining that the defendant was a "cunning 'jailhouse lawyer' " whose attorney was "of unquestioned competence and integrity" and that it was "inconceivable that his counsel did not fully explain to petitioner the possible consequences of his action."[92] The First Circuit

87. *See id.* at 42.

88. *See id.* at 42-43.

89. *Id.* at 43.

90. Mottram v. State, 232 A.2d 809 (Me. 1967).

91. Mottram v. State, 263 A.2d 715 (Me. 1970). Maine's highest court also held that Mottram's failure to include his constitutional objections to the underlying conviction on the direct appeal therefrom constituted a waiver of the right to present those issues collaterally. *See id.* at 725.

92. Mottram v. Murch, 330 F. Supp. 51, 57 (D. Me. 1971), *rev'd*, 458 F.2d 626 (1st Cir.), *rev'd per curiam*, 409 U.S. 41 (1972). The district court conducted a four-day evidentiary hearing on the deliberate bypass issue. *Id.* at 55. The attorney who had represented Mottram at the state postconviction proceeding in question was by that time deceased. *Id.* at 57. At the federal hearing, defendant testified that he did not understand the state judge's warnings with respect to waiver and that during the off-the-record conference in the foregoing state action his attorney had not fully explained the consequences of a failure to join all of the prisoner's claims. *Id.*

The federal trial judge's description of defendant as a person who "deserves his reputation as a cunning 'jailhouse lawyer,' " *id.*, was apparently based on Mottram's litigiousness. One of the numerous state court opinions affirming the denial of relief to the prisoner noted "the exceptional profluence of requests for review which has

reversed, stating that counsel's advice was not unreasonable and holding that, absent evidence that the defendant "was not acting in good faith reliance on counsel's opinion," a finding of deliberate bypass was unwarranted.[93]

The Supreme Court in turn reversed the First Circuit. It ruled that defendant's subjective intent not to abandon his constitutional claims was insufficient to preclude a bypass finding. The majority reasoned that in view of the state judge's warning to defendant the latter could not persist in his own interpretation of state law.[94] The

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followed Petitioner's conviction." Mottram v. State, 263 A.2d 715, 717 (Me. 1970). Defendant chose to represent himself in one proceeding, and in another "[t]hree competent counsel were appointed in succession to represent Petitioner." *Id.* at 718. The grounds for relief asserted by Mottram appear to have been multitudinous in almost every proceeding he initiated. *See, e.g.*, Mottram v. Murch, 330 F. Supp. 51, 54-55 (D. Me. 1971), *rev'd*, 458 F.2d 626 (1st Cir.), *rev'd per curiam*, 409 U.S. 41 (1972).

While all of the foregoing may be true and indeed may ultimately have been the basis for denial of relief by the federal district court and the Supreme Court, it should be noted that Mottram's activities may have been precipitated in part by the fact that his original conviction in 1958 was subsequently vacated in a state collateral action because of prosecutorial misconduct: the state had allowed false testimony to remain uncorrected and had misled defense counsel into believing that recordings that would have disclosed the falsity of the testimony were inaudible. *See id.* at 53. Moreover, the state court collateral remedies were extremely complex, and one of Mottram's earlier actions had been dismissed on the ground that *coram nobis* was not the appropriate remedy. Mottram v. State, 160 Me. 145, 200 A.2d 210 (1964). Finally, although Mottram was a seemingly knowledgeable jailhouse lawyer, he displayed a failing common to members of that bar; namely, his understanding of legal proceedings was of the shallowest nature, as demonstrated by his address to the state court judge concerning joinder during the postconviction hearing in question. His so-called explanation, *see* note 95 *infra*, can fairly be described as gibberish.

93. Mottram v. Murch, 458 F.2d 626 (1st Cir.), *rev'd per curiam*, 409 U.S. 41 (1972). In its analysis of Maine's complex and ambiguous postconviction laws, the First Circuit's opinion makes clear why Mottram's attorney could reasonably have erred in his interpretation of state law. *See id.* at 629. Indeed, the state trial judge who had warned defendant and his attorney of the perils of nonjoinder "entertained grave doubts" as to whether the collateral procedure provided by state law could be utilized to test the validity of parole revocations. Mottram v. State, 232 A.2d 809, 818 (Me. 1967). On the other hand, the Supreme Judicial Court of Maine had "no such concern" and proceeded to hold, apparently for the first time, that the postconviction proceeding in question was the appropriate remedy. *See id.*

There was confusion with respect to Maine's postconviction proceedings notwithstanding the state legislature's recent attempt to provide a single, exclusive remedy for all collateral attacks on judgments of conviction. *See* Mottram v. State, 263 A.2d 715, 719 (Me. 1970). To the extent that the states retain a wide variety of sometimes complex and confusing postconviction procedures and continue to impose defaults for failure to utilize the "proper" remedy, there is a greater possibility that state prisoners will attempt to use federal habeas as a means of securing a determination on the merits of their federal constitutional claims. *See* Case v. Nebraska, 381 U.S. 336, 338-39 (1965) (Clark, J., concurring); *id.* at 345-47 (Brennan, J., concurring).

94. Mottram v. Murch, 409 U.S. 41, 46 (1972) (per curiam). Justice Brennan, joined by Justices Douglas and Marshall, dissented, stating only, "I dissent and would

difficulty with this analysis is that it ignores the role of Mottram's attorney in the decision not to consolidate all of defendant's claims. Although defendant himself addressed the state trial judge in an attempt to explain why certain of the claims were being withdrawn[95] and although there was an off-the-record discussion between Mottram and his attorney prior to the decision to proceed solely on the parole revocation claim, it seems likely that defendant was relying on counsel's assessment of the law and that his attorney's mistake of law resulted in the default.[96]

Noia, however, provides that a deliberate bypass can only be made "after consultation with competent counsel" and, generally speaking, requires that such waivers be prompted by strategic or tactical considerations.[97] Neither the Supreme Court's opinion nor any of the lower court opinions, state or federal, suggests a possible strategic or tactical basis for Mottram's decision not to consolidate all claims.[98] At the time the procedural default was committed, the

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affirm because in my view the Court of Appeals reached the correct result on the facts presented." *Id.* at 47.

95. Although the Supreme Court did not discuss Mottram's address to the state tribunal, his statement was quoted in the federal district judge's opinion. As suggested previously, defendant's explanation was virtually incomprehensible; but since the state judge responded thereto, this may well be a case requiring one to be there in order to appreciate it. Mottram stated the following in response to the judge's ruling that this was a statutory postconviction hearing requiring joinder:

> "Well, I didn't understand that and there is a reason for my withdrawing the other argument. I had two petitions and one is I recently have recovered some files that show the appeal carried to the Supreme Court in 1963 was based on an impartial record and I want to go back before the Court on. That was a Writ of Error Coram Nobis that I last appeared before the Court on, and it wasn't my understanding this was a post conviction act. This type of Writ of Habeas Corpus—I thought this was for the plain Writ of Habeas Corpus."

Mottram v. Murch, 330 F. Supp. 51, 56 (D. Me. 1971), *rev'd,* 458 F.2d 626 (1st Cir.), *rev'd per curiam,* 409 U.S. 41 (1972).

96. *See* Mottram v. Murch, 458 F.2d 626, 629 (1st Cir.), *rev'd per curiam,* 409 U.S. 41 (1972).

97. *See* notes 27-29 *supra* and accompanying text.

98. It is conceivable that devotees of the Maine postconviction procedures would be aware of some possible strategic or tactical benefit in a case of this sort. An interloper in this esoteric area of Maine law could hazard these guesses: (1) by litigating the issues piecemeal there may be a possibility that each argument will be given more careful consideration; (2) the prisoner may hope that a more lenient judge will hear the subsequent claim; or (3) petitioner may believe that each writ will require his or her attendance in court, thus providing a respite from the possible rigors and monotony of state prison. Query whether the latter is either a tactical or strategic consideration.

Like the federal government, the states have the power to prevent piecemeal litigation of constitutional claims. In Sanders v. United States, 373 U.S. 1 (1963), the Court ruled, *inter alia,* that a federal prisoner who abuses the writ by deliberately withholding a ground for federal collateral relief may be deemed to have waived the right to a hearing on the subsequent application. The test established for determina-

state statute concerning the scope of postconviction proceedings was ambiguous on its face, and there had been no definitive appellate court interpretation thereof.[99] Given the complexity and uncertainty of state law, the trial court's dire warning, and the absence of any known strategic benefit that could accrue to defendant by refusing to join his claims, serious question is raised as to whether Mottram's attorney was acting responsibly in insisting on a separation of claims. Thus, the Supreme Court's apparent acceptance of the federal district court's conclusion as to the "unquestioned competence" of counsel is somewhat puzzling. Moreover, putting the question of counsel's competence aside, the absence of any finding of a strategic basis for the default would, under *Noia,* appear to preclude a bypass finding.

Furthermore, if counsel's action in this case was the result of an honest mistake rather than incompetence, then the net effect of the *Mottram* decision is to construe an attorney's reasonable, good faith determination to obtain a definitive ruling on the interpretation of an ambiguous state law by the state's highest court as an intent to bypass state remedies. Finding a waiver on the basis of a trial judge's admonition effectively makes trial judges the final arbiters of state law unless counsel is willing to risk forfeiture of his or her client's right to assert constitutional claims. What counsel did was not to "bypass orderly state procedures,"[100] but to seek a definitive ruling by higher authority. To consider such action a deliberate circumvention of state remedies with an attendant forfeiture of the federal habeas forum distorts the comity doctrine beyond recognition and is wholly at odds with the Court's repeated admonition that criminal trials are not sporting contests.[101]

One year after *Mottram,* the Court decided two cases dealing with pretrial waivers—*Tollett v. Henderson*[102] and *Davis v. United States*[103]—that eroded *Noia*'s bypass standard even further. *Tollett,* a federal habeas action, held that a plea of guilty precluded an inquiry into the merits of petitioner's claim of discrimination in selec-

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tion with respect to deliberate withholding appears to be the *Noia* bypass standard. *See id.* at 18. Although the Court in *Mottram* cited the *Sanders* opinion for the proposition that the states also have the right to establish orderly procedures for the assertion of constitutional claims, this invocation of *Sanders* is not dispositive of the deliberate bypass issue since a finding of bypass must, at the least, be based on a determination that the default in question was strategic or tactical.

99. *See* Mottram v. Murch, 458 F.2d 626, 629 (1st Cir.), *rev'd per curiam,* 409 U.S. 41 (1972).

100. Murch v. Mottram, 409 U.S. 41, 47 (1972) (per curiam).

101. *See, e.g.,* Brewer v. Williams, 430 U.S. 387, 416-17 (1977) (Burger, C.J., dissenting); Williams v. Florida, 399 U.S. 78, 106 (1970) (Burger, C.J., concurring); Fisher v. United States, 328 U.S. 463, 485 n.8 (1945) (Frankfurter, J., dissenting).

102. 411 U.S. 258 (1973).

103. 411 U.S. 233 (1973).

tion of the state grand jury that had indicted him, even though neither defendant nor his attorney was aware of the facts underlying the constitutional claim at the time the plea was entered. The *Tollett* majority viewed this ruling as a mere extension of its holdings in the *Brady* trilogy of 1970[104] that guilty pleas barred the assertion of known antecedent constitutional claims, such as those involving coerced confessions.

In *McMann v. Richardson*,[105] one of the cases comprising the *Brady* trilogy, the Court appeared to view the guilty plea as a "waiver" of both the right to trial and the right to challenge allegedly unconstitutional evidence that might have been introduced by the state against the defendant at trial; thus, the Court required that the plea "be an intelligent act 'done with sufficient awareness of the relevant circumstances and likely consequences.' "[106] At the same time, however, the Court considered the defendant's plea of guilty to be a deliberate bypass of state procedures for determining the validity of antecedent constitutional claims. The Court suggested that a defendant who believed that his or her confession was coerced and that the state's case without the confession would result in acquittal would normally go to trial and contest the issue of voluntariness. If the defendant pleaded guilty, however, the majority reasoned that

104. Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970).

Brady concerned a 1959 guilty plea to a kidnapping charge under a statute that the Supreme Court held unconstitutional nine years later on the ground that it needlessly discouraged assertion of fifth and sixth amendment rights by permitting only the jury to impose a death penalty. The *Brady* Court held that the plea of guilty was voluntarily and intelligently made, even though defendant may have been motivated in part by a desire to escape the death penalty.

McMann was a case in which defendants alleged that their pleas of guilty were involuntary because induced by coerced confessions. The Court held that a plea of guilty based on reasonably competent advice of counsel concerning admissibility of a confession would not be rendered involuntary although, at the time the plea was entered, the state had no constitutionally valid procedure for determining the voluntariness of confessions.

In *Parker*, the defendant, who pleaded guilty to burglary, alleged that the plea was involuntary (1) because state law, like the federal statute involved in *Brady*, permitted only the jury to assess a death penalty; (2) because the plea was the product of a coerced confession; and (3) because the selection procedure with respect to the grand jury that indicted him was unconstitutional. The Court held that an otherwise valid guilty plea was not involuntary because defendant wished to limit the maximum penalty, that defendant was not entitled to attack the plea on the ground that counsel misjudged the admissibility of his confession, and that, since the state court had refused to consider the grand jury claim on waiver grounds, the adequate state ground rule precluded Supreme Court review in the case of a direct appeal from a judgment rendered in a collateral state proceeding.

105. 397 U.S. 759 (1970), *discussed at* note 104 *supra*.

106. *Id.* at 766 (quoting in part Brady v. United States, 397 U.S. 742, 748 (1970)).

the plea could not have been motivated by the confession since defendant regarded it as inadmissible and not properly a part of the state's evidence. Therefore, a guilty plea in such circumstances was considered to be

> nothing less than a refusal to present his federal claims to the state court in the first instance—a choice by the defendant to take the benefits, if any, of a plea of guilty and then to pursue his coerced-confession claim in collateral proceedings . . . . [W]hether his plain bypass of state remedies was an intelligent act depends on whether he was so incompetently advised by counsel concerning the forum in which he should first present his federal claim that the Constitution will afford him another chance to plead.[107]

The Court went on to assert that the more likely explanation for the plea was that the hypothetical defendant "mistakenly assessed" the admissibility of the confession.[108] Because some risk of miscalculation is inherent in any decision to waive trial, however, the Court rejected this as sufficient justification for voiding the guilty plea.[109] Instead, the plea was vulnerable only if defendant's attorney did not give "reasonably competent advice," which was in turn defined as advice "within the range of competence demanded of attorneys in criminal cases."[110]

Thus, the *Brady* trilogy engrafted upon *Noia* an almost conclusive presumption that all defendants pleading guilty are making strategic or tactical choices, rather than focusing on the particular defendant in each case and ascertaining whether his or her plea was strategically motivated. The trilogy also appears to dilute *Noia*'s requirement of competent counsel. Although acknowledging that defendants are entitled to effective assistance of counsel, the Court in the *Brady* trilogy ultimately left the determination of competency to the "good sense and discretion of the trial courts" and required only that counsel's advice be within the general "range of competence" of criminal defense attorneys.[111]

The *Brady* trilogy, however, at least appeared to retain the requirement that the claim relinquished as a result of the guilty plea

107. *Id.* at 768-69.

108. *Id.* at 769.

109. *Id.* at 770.

110. *Id.* at 770-71.

111. *Id.* at 771. In his dissenting opinion in *McMann*, Justice Brennan noted that even the most competent defense counsel would be of no value because in both *Parker* and *Brady* there was nothing that counsel could do to counteract the unconstitutionality of the death penalty scheme and its possibly coercive effect in inducing guilty pleas. Similarly, he observed that the advice of counsel in the *McMann* case could not remedy the unconstitutionality of New York's procedure for determining the voluntariness of confessions insofar as that procedure may have resulted in the improper inducement of guilty pleas. *See id.* at 782-83.

be known to the accused and to defense counsel.[112] The same cannot be said with respect to the 1973 decision in *Tollett v. Henderson.*[113] Although defendant's guilty plea in that case may have been a waiver in the sense that it was a knowing and intelligent relinquishment of the right to trial, the Court acknowledged that, under a *Johnson v. Zerbst* definition, Henderson's grand jury claim could not possibly be deemed waived since neither Henderson nor his attorney was aware of the facts relating to the grand jury selection process.[114] It thus would be impossible to conclude that the failure to challenge the grand jury evidenced an intent to bypass state procedures for initial determination of the merits of the claim. The Court nonetheless decided, as in the *Brady* trilogy, that the guilty plea precluded a direct determination on the merits of defendant's constitutional challenge. The only relevance of the antecedent constitutional claim was its bearing on whether the plea was knowing and voluntary, which in turn depended on whether the advice of counsel was " 'within the range of competence demanded of attorneys in criminal cases.' "[115]

The Court admitted that "[c]ounsel's failure to properly evaluate facts giving rise to a constitutional claim, or his failure properly to inform himself of facts that would have shown the existence of a constitutional claim, might in particular fact situations" demonstrate incompetence.[116] The Supreme Court intimated that, because the lower federal court had relied on a state judge's conclusion that " '[n]o lawyer in this State would have ever thought of objecting to the fact that Negroes did not serve on the Grand Jury in Tennessee in 1948,' "[117] it was improbable that Henderson could sustain the

112. Justice Brennan took the position that the guilty pleas in the *McMann* case did not constitute the relinquishment of a "known" right since they were entered at a time when the state's procedure for testing the voluntariness of confessions was constitutionally inadequate but had not yet been so declared by the Supreme Court. Thus, there was "no sense in which respondents deliberately by-passed or 'waived' state procedures constitutionally adequate to adjudicate their coerced-confession claims." *Id.* at 785 (dissenting opinion). A basic difficulty with the majority's decision in *McMann* is that the Court's decision in Jackson v. Denno, 378 U.S. 368 (1964), which invalidated the existing New York procedure and instead required a separate pretrial hearing on the voluntariness of confessions, was held to be retroactive; thus, had the petitioners in *McMann*, who were prosecuted prior to the *Jackson v. Denno* decision, proceeded to trial rather than pleading guilty, their judgments of conviction would have been invalid. *See* McMann v. Richardson, 397 U.S. 759, 783-85 (1970) (Brennan, J., dissenting). *Compare* Smith v. Yeager, 393 U.S. 122 (1968) (per curiam), *discussed at* note 70 *supra.*

113. 411 U.S. 258 (1973).

114. *Id.* at 266.

115. *Id.* (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

116. *Id.* at 266-67.

117. *Id.* at 269 (quoting State *ex rel.* Henderson v. Russell, 459 S.W.2d 176, 179 (Tenn. Crim. App. 1970) (Galbreath, J., concurring)). In his dissenting opinion, Justice Marshall asserted that, even if attorneys in Tennessee in 1948 did not generally

burden of proving that his attorney's advice was not within the required range of competence. The Court also suggested that a "principal value" of an attorney in criminal cases lies in the pragmatic ability to effectuate a good plea bargain rather than to advise the accused of all possible defenses and the underlying factual support therefor.[118]

In the foregoing manner, without mentioning either *Noia* or deliberate bypass, the Court either significantly modified *Noia*'s bypass requirements or eliminated them altogether in the plea context. Although the Court in the *Brady* trilogy viewed pleas as both waivers and deliberate bypasses of state remedies, the inference of a deliberate bypass was perhaps not completely unjustified since the defendants were at least aware of the antecedent constitutional claim. Thus, the decision to plead guilty could be viewed as evidencing an intention not to utilize the state procedure for vindication of that claim on the merits.[119] In *Tollett v. Henderson,* because of the lack

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make such objections to grand jury composition,

> [d]etermination of whether counsel is competent should not turn on the fact that many attorneys in a particular place at a given time would not think of raising certain claims. The test must be whether the advice was competent in light of the law of the time, and without regard to local peculiarities.

Id. at 276-77 (citations and footnote omitted). Applying the above test, Justice Marshall found that the state's practice of grand jury discrimination was so blatant that it would have been extremely simple to ascertain the relevant facts and that even "[a]n attorney of minimal competence would have realized that, where no Negroes had been summoned for service over many years and where racial designations were used, the Tennessee Supreme Court would very probably have held the selection system unconstitutional." *Id.* at 277.

118. *Id.* at 267-68. Justice Marshall in dissent took issue with the majority's suggestion that, because there were so many constitutional objections that could be raised, requiring counsel to discuss each one of them with the defendant would be impractical. He contended that, in most cases, only one or two meritorious objections could be raised, and these were "after all . . . objections bottomed on constitutional guarantees." *Id.* at 272.

Justice Marshall also reflected the deep philosophical division on the Court with respect to the duties of criminal defense counsel. He stated,

> In the end, the Court seems to adopt a concept of professional responsibility that I cannot accept . . . . "[F]aithful representation of the interest of his client" . . . means, I believe, that an attorney must consult with the client fully on matters of constitutional magnitude. Without such consultation, the representation of criminal defendants becomes only another method of manipulating persons in situations where their control over their lives is precisely what is at stake.

Id. at 272-73 (quoting in part the majority opinion). *Compare* notes 289-304 *infra* and accompanying text.

119. *But see* Tigar, *The Supreme Court, 1969 Term—Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel,* 84 HARV. L. REV. 1, 21-22 (1970):

> [T]he notion that a guilty plea cures prior procedural defects creates an arbitrary distinction since the decision to plead guilty is not based solely on

of knowledge, there is no basis for making that same assumption. Although the guilty plea may have been a knowing and intelligent relinquishment of the right to trial, it cannot support an inference that defendant, by the same act, intended to circumvent state procedures for vindication of a constitutional claim of which he was unaware and that related not to the right to trial, but to the antecedent right to be indicted by a grand jury not infected by racial discrimination.

Thus, without explicitly saying so, the *Tollett* Court appeared to create a distinction between the standards governing waiver and deliberate bypass. Since the Court did not even refer to bypass, there is no way of knowing whether this concept exists at all in the guilty plea context. If bypass is applicable to plea cases, it is impossible to ascertain from *Tollett* what standards are to guide the inquiry. Defendant and his attorney were unaware of the facts underlying the claim, thereby precluding any possibility of personal participation by the defendant after consultation with competent counsel. Moreover, since defendant could not use as a bargaining tool a claim of which he had no knowledge,[120] there was no conceivable strategic or tactical benefit to be gained by pleading guilty in exchange for bypassing state remedies.[121] Therefore, unless the waiver rule announced in *Tollett* is considered to be applicable only in plea cases and is viewed simply as part of a continuing effort to insulate guilty pleas from attacks based on antecedent constitutional claims, the effect of *Tollett* is to nullify *Noia*'s deliberate bypass doctrine.

If *Tollett* is read as eliminating the bypass rule in plea cases,

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the prospects for excluding evidence or challenging the indictment process. The decision may turn upon such factors as the defendant's insistence upon trial, the willingness of his attorney to press the matter to litigation, and the entire network of irrational pressures which experience shows dominate the decisions of a criminal defendant from the moment he enters the criminal process.

120. In the *Brady* trilogy, a strategic benefit can be inferred from the guilty plea since the state, knowing a coerced confession was inadmissible, would at least theoretically be willing to make a concession in plea or sentence to avoid litigation on the admissibility of the confession. In *Tollett*, however, no quid pro quo on the part of the state was possible, since the state claimed that a motion to quash the indictment would have been futile, thus indicating its belief that it had nothing to lose and no reason to bargain concerning the grand jury claim. *See* Tollett v. Henderson, 411 U.S. 258, 277 n.10 (1973) (Marshall, J., dissenting).

121. As noted by Justice Marshall, had defendant's attorney challenged the grand jury selection process, Henderson may very well have received a sentence less than the 99 years that was in fact imposed. By requiring the state to defend its blatantly unconstitutional practices, defendant might have embarrassed the prosecution into offering a lesser sentence, or, in any event, Henderson could have thereby secured additional time to prepare his defense. *See id.* at 273 & n.3 (Marshall, J., dissenting).

Davis v. United States,[122] decided on the same day in 1973, can be said to have accomplished the same result with respect to cases in which collateral relief is sought by federal prisoners. In *Davis* the Court found the bypass requirement inapplicable where a Federal Rule of Criminal Procedure provided that objections to grand jury composition not asserted prior to trial were "waived" absent a showing of "cause" for the default.[123] The Court interpreted the rule to mean that a constitutional claim was waived if not timely asserted, regardless of whether there had been a conscious decision to relinquish the right. Accordingly, there was no need to determine whether defendant personally participated in the default.[124] Indeed, counsel's omission was imputed to the defendant even though this was clearly not a situation in which a contemporaneous objection during trial was required. Thus, whereas the personal participation requirement was presumably dispensed with in *Henry* because of the ostensible need for immediate action on the part of counsel, no such urgency was

122. 411 U.S. 233 (1973).

123. The *Davis* opinion distinguished Kaufman v. United States, 394 U.S. 217 (1969), *discussed at* notes 65-73 *supra* and accompanying text, on the ground that the Federal Rule of Criminal Procedure involved in the latter case—Rule 41(e)—did not contain an express waiver provision as did Rule 12(b)(2).

Subsequent to the *Davis* decision, Rule 12 was amended to include a waiver provision relating to motions to suppress evidence such as that involved in *Kaufman*. *See* FED. R. CRIM. P. 12(b)(3).

As pointed out in the dissenting opinion in *Davis*, however, Rule 41(e), the rule dealing with motions to suppress illegally seized evidence in effect at the time *Kaufman* was decided, was similar to Rule 12(b)(2) in requiring a timely motion and providing for an excuse where cause was shown, except that it did not contain the "magical" word "waiver." *See* 411 U.S. at 248 (Marshall, J., dissenting). For discussion of an additional distinction between *Kaufman* and *Davis*, see note 37 *supra*.

In *Davis*, the majority also relied on Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963), in which defendants, four years after trial, moved in a section 2255 action to set aside their indictments on the ground that the grand jury was improperly selected. The motion was denied on the basis of Rule 12(b)(2). As the *Davis* Court noted, however, at the time the motion was made in *Shotwell*, defendants' direct appeal was still pending. Thus, the *Shotwell* case is distinguishable on that ground since resolution of the appeal may have obviated the necessity of making the constitutional determination sought in the section 2255 action. Davis, on the other hand, had no remaining remedy other than his section 2255 suit.

124. The majority noted that Davis "was represented throughout the trial by competent, court-appointed counsel, whose advocacy prompted the Court of Appeals to compliment him." 411 U.S. at 234 n.1. Taking into account this emphasis on counsel's competence as well as the Court's suggestion that defendant's failure to make the grand jury claim was not prejudicial in view of the indictments returned against Davis' white codefendants, it remains unclear why a hearing could not have been conducted at which Davis' trial attorney presumably would testify that he discussed the possibility of an attack on the grand jury with his client, and they decided on the basis of tactical considerations not to assert it. *See id.* at 255 n.11 (Marshall, J., dissenting).

present with respect to the pretrial motion to challenge a grand jury indictment. Adopting the lower court's position, Justice Rehnquist found that the requisite showing of cause was not made since " 'no reason [was] suggested why petitioner or his attorney could not have ascertained all of the facts necessary to present the objection to the court prior to trial.' "[125] A further or alternate requirement of "actual prejudice" was introduced and found to be wanting.[126]

Although the Court did not employ a deliberate bypass theory, because of the express "waiver" provision of the Federal Rule, and accordingly did not feel obliged to determine whether the default in *Davis* was attributable to a tactical maneuver, it did introduce the issue of tactics as an abstract policy consideration. The majority reasoned that failure to assert challenges to grand jury composition in a timely manner so that errors could be cured before trial might be motivated by "strong tactical considerations" with a view to securing reversal on this basis in the event of conviction.[127] Thus, regardless of the general validity of this policy consideration,[128] its effect is to impose forfeitures without making any determination of

125. *Id.* at 243 (quoting district court opinion).

126. The Court in *Davis* did not make clear whether failure to make a pretrial motion challenging the grand jury pursuant to Rule 12(b)(2) could be excused by a showing of either good cause or prejudice or whether proof of both elements was required. *See id.* at 243-45. At least a showing of prejudice alone arguably would have been sufficient to demonstrate cause as required by Rule 12.

In overruling defendant's contention that prejudice need not be demonstrated since racial discrimination in the grand jury selection process was inherently prejudicial, the *Davis* Court distinguished Peters v. Kiff, 407 U.S. 493 (1972), where the Court held that a white defendant had standing to challenge the composition of a grand jury from which blacks had been excluded on the theory that prejudice could be presumed in the case of racial discrimination. By requiring Davis to show actual prejudice, the Court created a distinction between the proof needed to demonstrate the existence of a constitutional right and the proof required to excuse a default in failing to assert such a claim at the proper time. Applying this actual prejudice test, the Court accepted the district judge's finding that the case had no racial overtones, that the same grand jury had indicted two white codefendants, and that there was sufficient evidence to warrant the indictment.

127. *See* 411 U.S. at 241. The United States argued that permitting such belated challenges would make reprosecution extremely difficult. The dissent countered that, if the grand jury indictment was set aside and a new trial ordered and if witnesses who had testified in the original proceedings were no longer available, the entire case could be presented by introduction of the transcript of the first trial. The dissent contrasted a finding that evidence was illegally seized, noting that in the latter situation the prosecution might be required to restructure its entire case, whereas it would not have to do so if a grand jury challenge was successful. Acknowledging that retrials were costly, the dissenters noted that the logical extension of the Government's argument would be to preclude reversal even in the case of plain error where no objection had been made. *See id.* at 250-52.

128. *See* text following note 345 *infra*.

whether Davis or any other particular defendant was so motivated.[129]

It soon became clear that under the Court's emerging view of federalism the waiver doctrine and underlying policy analysis articulated in *Davis*, although based on an interpretation of the Federal Rules of Criminal Procedure,[130] would inevitably spill over into the law of federal habeas for state prisoners.

E. THE FALL OF *Noia* AND DELIBERATE BYPASS: *Francis v. Henderson* AND *Estelle v. Williams*

Like the *Davis* case, *Francis v. Henderson*[131] involved a failure to challenge as racially discriminatory a grand jury selection method. This time, however, the case arose in the context of a state prosecution in a jurisdiction whose procedural rules provided that such defaults were deemed waivers.[132] In a remarkable demonstration of judicial dispatch, Justice Stewart's five-page opinion accepted Louisiana's contention that defendant's failure to lodge a timely challenge as required by state law precluded federal habeas relief, without mentioning either deliberate bypass or the underlying facts of the case. In an Orwellian twist, the majority's single citation of *Fay v. Noia* was in support of the proposition that "in some circumstances, considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo the exercise of its habeas corpus power."[133] Quoting extensively from

129. *See* Davis v. United States, 411 U.S. 233, 249-51 (1973) (Marshall, J., dissenting).

130. The majority in *Davis* relied heavily on congressional intent, concluding "that the necessary effect of the congressional adoption of Rule 12(b)(2) is to provide that a claim once waived pursuant to that Rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of a showing of 'cause.'" *Id.* at 242. The Court's reasoning concerning the effect to be given the Federal Rules of Criminal Procedure appears to be circular. First, Justice Rehnquist asserted that the Rules do not govern section 2255 habeas proceedings, and, as a result, the Court in *Kaufman* had been able to interpret section 2255 so as to impose its own doctrine of waiver—deliberate bypass. The majority proceeded to find that Congress, having provided by its adoption of Rule 12 for waivers absent cause in federal criminal proceedings, could not have intended to permit circumvention thereof by permitting a claim barred by Rule 12 to be raised in a section 2255 action. Thus, Rule 12 seems to apply to habeas actions by federal prisoners even though the Federal Rules do not apply.

In any event, regardless of the validity of this interpretation of congressional intent with respect to Rule 12, if this interpretation formed the underpinning of the *Davis* decision, it should have had no effect on section 2254 since state rules of criminal procedure obviously cannot modify or limit federal statutes (absent Congress' incorporation of state law by reference).

131. 425 U.S. 536 (1976).

132. *See id.* at 537.

133. *Id.* at 539. In similar fashion, the Court cited Kaufman v. United States,

Davis, which involved a federal prisoner, and *Michel v. Louisiana*,[134] a 1955 case also inapposite because it was a direct appeal, the Court's only original contribution was its bald assertion that both "cause" and "actual prejudice" must be present in order to excuse a failure to challenge the grand jury composition.[135]

The facts, as disclosed in Justice Brennan's dissenting opinion and in the joint Appendix submitted to the Court, make it absolutely clear that the majority could not have addressed the deliberate bypass test articulated in either *Noia* or *Henry*, since such a discussion would have necessitated an analysis of the defendant's personal participation, or imputation of counsel's default to defendant, or strategic and tactical considerations underlying the default, or, perhaps of most importance, the effectiveness of counsel. If the Court had considered any one of these factors, it could not have found a deliberate bypass in Francis' case.

On December 10, 1964, Abraham Francis, a black seventeen-year-old youth, was indicted on a charge of felony murder based on a grocery store robbery of a white couple in the course of which a coconspirator was killed.[136] Utilization of the felony murder theory

394 U.S. 217 (1969), *discussed at* notes 65-73 *supra* and accompanying text, for the proposition that defaults by federal defendants should not result in the imposition of greater forfeitures than defaults by state prisoners. *See* 425 U.S. at 542. This statement in *Kaufman* was made in response to the Government's argument that, while the *Noia* rule may have been appropriate in the case of state prisoners who have never had an opportunity to litigate their federal claims in a federal forum, the underlying considerations involved were inapplicable to federal prisoners. The *Kaufman* Court rejected this contention and held that federal prisoners should have the same right as state prisoners to assert constitutional claims collaterally. 394 U.S. at 225-26.

Thus, the *Francis* Court invoked *Noia*, which had tremendously expanded the availability of federal habeas for state prisoners, as authority for the imposition of almost absolute forfeitures in the name of comity; it also invoked *Kaufman*, which had enlarged the scope of habeas for federal prisoners, as authority for curtailing the habeas rights of state prisoners. *Cf.* G. ORWELL, *The Principles of Newspeak*, in 1984, at 303 app. (1949) (In describing the principles of Newspeak, Orwell noted that a favored technique was to purge words of their undesirable meanings. "To give a single example. The word *free* still existed in Newspeak, but it could only be used in such statements as 'This dog is free from lice' . . . . It could not be used in its old sense of 'politically free' or 'intellectually free' . . . . ").

134. 350 U.S. 91 (1955).

135. In support of these dual requirements, the Court cited Davis v. United States, 411 U.S. 233 (1973), *discussed at* notes 122-30 *supra* and accompanying text. *See* Francis v. Henderson, 425 U.S. 536, 542 n.6 (1976). In *Davis*, however, it was unclear whether a showing of prejudice was a separate requirement or simply one means of satisfying the cause requirement of Rule 12 of the Federal Rules of Criminal Procedure. *See id.* at 552 n.3 (Brennan, J., dissenting).

136. Francis v. Henderson, 425 U.S. 536, 554 (1976) (Brennan, J., dissenting). At the time of the offense, defendant was sixteen years of age. Record, Louisiana *ex*

where a robbery victim killed a perpetrator was so unusual that one of the prosecuting attorneys could not recollect it ever having been used in that county.[137] Francis' counsel, who was uncompensated, was not appointed until February 9, 1965, two months after the indictment.[138] In addition, he was a civil lawyer who had not handled any criminal matters for years and had not defended a capital case in fifteen years.[139] Presumably because of his inexperience, several months after his appointment he asked another attorney to assist him in the trial of the case.[140] The newly retained cocounsel had been formally representing one of the codefendants and informally representing another, who was his relative.[141] These codefendants, who

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rel. Francis v. Henderson, No. 187-385-G (Crim. Dist. Ct., Orleans Parish, La., Dec. 20, 1971), *reprinted in* Appendix at 22, 56, Francis v. Henderson, 425 U.S. 536 (1976) [hereinafter cited as *Francis* Appendix (state habeas proceedings)]. One of the victims of the robbery was also shot, but not killed. Although the Appendix to *Francis* is ambiguous in this regard, *see Francis* Appendix (state habeas proceedings), *supra* at 70-71, according to counsel representing Francis before the Supreme Court, Francis himself did no shooting; instead, the deceased coperpetrator shot one of the robbery victims, who in turn shot and killed the deceased. Telephone Interview with Bruce S. Rogow, Attorney for Defendant Francis (July 22, 1977).

137. *See* 425 U.S. at 554 (Brennan, J., dissenting); *Francis* Appendix (state habeas proceedings), *supra* note 136, at 71.

138. Francis v. Henderson, No. 72-719 (E.D. La., Sept. 20, 1973), *vacated and remanded sub nom.* Newman v. Henderson, 496 F.2d 896 (5th Cir. 1974), *aff'd sub nom.* Francis v. Henderson, 425 U.S. 536 (1976), *reprinted in* Appendix at 87, Francis v. Henderson, 425 U.S. 536 (1976) [hereinafter cited as *Francis* Appendix (federal district court opinion)]; Application and Assignment of Counsel, State v. Francis, No. 187-385-G (Crim. Dist. Ct., Orleans Parish, La., June 29, 1965), *reprinted in* Appendix at 12, Francis v. Henderson, 425 U.S. 536 (1976).

139. *Francis* Appendix (state habeas proceedings), *supra* note 136, at 23, 31. Both the federal district court and Justice Brennan's dissenting opinion refer to the failing health of defendant's attorney at the time of trial. *See* 425 U.S. at 554; *Francis* Appendix (federal district court opinion), *supra* note 138, at 90 n.4. This appears to be an error, however, perhaps stemming from the testimony of cocounsel at the state habeas proceeding that Francis' chief attorney at the original trial was, by the time of the collateral proceeding, very old and too sick to attend the habeas hearing. *See Francis* Appendix (state habeas proceedings), *supra* note 136, at 27. The state habeas action took place in 1971, six years after the trial. At the time the case was argued before the Supreme Court, chief counsel was dead. *See* Brief for Petitioner at 8 n.1, Francis v. Henderson, 425 U.S. 536 (1976).

140. *Francis* Appendix (state habeas proceedings), *supra* note 136, at 26-27, 38.

141. *Id.* at 27-28, 40, 62. Cocounsel felt that there was no conflict of interest. *See id.* at 28. He testified, "We were sort of like co-counsel for everybody. That's the way it was in those days." *Id.*

Both attorneys representing Francis at his trial in 1965 were black, *id.* at 47, a fact seized on by the state in its brief to the Supreme Court a decade later. Louisiana contended that black attorneys "would have felt no hesitation about urging the jury discrimination issue had they felt it was warranted." Brief for Respondent at 7, Francis v. Henderson, 425 U.S. 536 (1976). In the same brief, the state conceded that, at the time in question, "[f]or sound reasons black attorneys were often appointed to repre-

were 21 and 22 years of age, were permitted to plead to manslaughter charges, and each received an eight-year sentence.[142] For reasons that are unclear, Francis was not allowed to enter a similar plea, and Louisiana sought imposition of the death penalty in his case.[143]

On the day before trial of this capital case, Francis' chief counsel filed his first motions, which did not include a challenge to the grand jury.[144] Without a hearing, the court denied a motion to suppress defendant's confession.[145] Defendant's trial lasted one day, with neither defense counsel making a summation.[146] Francis was found guilty and sentenced to life imprisonment.[147]

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sent black accuseds in capital cases in Orleans Parish . . . . Pertinently, the three attorneys who represented [the defendant in a leading Louisiana grand jury discrimination case decided in 1964] . . . were all black." *Id.* at 7 n.3. That statements of this sort would be included in a brief submitted to the Supreme Court of the United States in 1975 suggests that the Louisiana Attorney General was oblivious to the tacit admission that white attorneys might not represent black defendants with zeal, or that the state was appointing defense counsel in criminal cases on a racially discriminatory basis, or that Louisiana believed that the Supreme Court would be reluctant to find that black attorneys had rendered a black defendant ineffective assistance in determining that the cause or prejudice requirements had been met.

142. 425 U.S. at 554 (Brennan, J., dissenting); Court Document, State v.Francis, No. 187-385-G (Crim. Dist. Ct., Orleans Parish, La., June 29, 1965), *reprinted in* Appendix at 8, Francis v. Henderson, 425 U.S. 536 (1976); *Francis* Appendix (state habeas proceedings), *supra* note 136, at 62.

143. 425 U.S. at 554 n.5 (Brennan, J., dissenting); *Francis* Appendix (state habeas proceeding), *supra* note 136, at 29. At the state habeas proceeding, when cocounsel was asked why Francis had not also pleaded to manslaughter, he responded that "the State was out to put him in the electric chair." *Id.* Francis' attorney at the state habeas hearing intimated that state law might have precluded a minor from pleading to manslaughter charges, which, he said, "in itself might be a denial of certain Constitutional rights." *Id.*

144. 425 U.S. at 554 (Brennan, J., dissenting); *see* Defendant's Motions, State v. Francis, No. 187-385-G (Crim. Dist. Ct., Orleans Parish, La., June 29, 1965), *reprinted in* Appendix at 13-20, Francis v. Henderson, 425 U.S. 536 (1976). These were the only motions filed on Francis' behalf. They were a motion for production of copies of statements made by the defendant, an application for a bill of particulars, a motion to quash the indictment on vagueness grounds, a motion to suppress evidence, and a motion for a continuance. There is some question as to whether the motion to suppress was filed the day before trial or the day of trial. *See* 425 U.S. at 554 (Brennan, J., dissenting); *Francis* Appendix (state habeas proceedings), *supra* note 136, at 19-20, 29, 32, 34. Justice Brennan referred to these motions as elementary. 425 U.S. at 554.

According to Francis' attorney at the Supreme Court level,

> [t]he Motions were merely copies of motions which had been filed for another defendant with the name of that defendant struck through in pen and Francis' name substituted. The Motion for a Continuance was a form used by the District Attorney which [defense counsel], by striking through with a pen, adapted for his own use.

Brief for Petitioner at 8 n.2.

145. *Francis* Appendix (state habeas proceedings), *supra* note 136, at 31, 52-53.

146. *See id.* at 34, 72.

147. 425 U.S. at 554 (Brennan, J., dissenting); Record Appended to Bill of

Apparently no attack was made with respect to the composition of the grand jury because defendant's chief attorney did not believe in "wasted effort."[148] Similarly, although the defendant "kept hollering for an appeal,"[149] none was taken because Francis' attorneys believed that a successful appeal might subject Francis to retrial and a possible death sentence[150] or that, if he appealed, the state would successfully prosecute him for the underlying robbery, and a consecutive thirty-year sentence would be imposed.[151] Furthermore, in the words of cocounsel, "I am not going to kid, we didn't want to be tied up with the rest of our lives with a Court-appointed case."[152]

Indictment, State v. Francis, No. 187-385-G (Crim. Dist. Ct., Orleans Parish, La., June 29, 1965), *reprinted in* Appendix at 9, Francis v. Henderson, 425 U.S. 536 (1976).

148. *Francis* Appendix (state habeas proceedings), *supra* note 136, at 26. Cocounsel for Francis at the trial subsequently testified, "I would believe and not trying to pass the buck that [chief counsel] didn't want to do it. There were blacks on the Grand Jury and black [*sic*] in the Petit Jury panel and he has his own ideas about things, you know." *Id.* When asked whether the two defense attorneys had discussed a challenge of the grand jury, cocounsel stated,

> I don't recal [*sic*] but like I said, if we did I am of the opinion he wouldn't have done it because [chief counsel] is a man that doesn't believe in what he calls wasted effort. . . .
>
> . . . .
>
> . . . I wasn't in the case at the outset . . . . When you come into a case like that sort of haphazard things that have been done, you don't question them and apparently I didn't.

Id. But see id. at 25 (cocounsel testified that "all the decisions [of counsel] were joint decisions").

The fact that there may have been blacks on the grand jury that indicted Francis did not preclude a finding by the district court in the subsequent federal habeas proceeding that the grand jury was selected in an unconstitutional manner, in that daily wage earners were systematically excluded, resulting in the exclusion of a disproportionate number of blacks. *See* 425 U.S. at 555 (Brennan, J., dissenting).

Indeed, cocounsel for Francis at the original trial also testified that he knew that challenges to the grand jury were being made at that time and that he himself had made such challenges. *See Francis* Appendix (state habeas proceedings), *supra* note 136, at 26.

149. *Francis* Appendix (state habeas proceeding), *supra* note 136, at 36. At the sentencing, the defendant "waived" his right to appeal as a result of the following colloquy:

> The Court: Does the defendant state at this time he does not intend to take an appeal?
>
> The Defendant: I am not.

Id. at 21.

150. *See id.* at 38.

151. *See id.* at 35, 37. One of the assistant district attorneys who prosecuted the defendant testified thereafter that the "general consensus" was that such a sentence consecutive to life imprisonment could not be imposed and that he knew of none ever having been imposed. *See id.* at 67. Nor could he recall any "appeal bargaining" in the *Francis* case, that is, any agreement not to prosecute on the basis of the underlying robbery if defendant agreed not to appeal. *See id.* at 66.

152. *Id.* at 36.

The foregoing evidence concerning the reasons for not appealing the conviction was secured in a state habeas proceeding held in 1971 for the purpose of obtaining a transcript of the trial. The transcript was denied on the grounds that both attorneys were competent, that defendant had waived his right to appeal upon advice of counsel and parents, and "that the attack on the grand jury venire was considered by his attorneys who chose not to make such an attack."[153]

After all state remedies were exhausted, Francis instituted a federal habeas action, in which the United States District Judge granted the writ, finding that defendant had not waived his rights either to an appeal or to challenge the grand jury and that the grand jury selection process was unconstitutional.[154] Although the court thought the *Davis* decision inapplicable because of *Noia*'s deliberate bypass ruling, it assumed that, even if *Davis* were controlling, cause had been shown by virtue of defense counsel's inadequacy.[155] Reversing the district court, the Fifth Circuit held that *Davis* was dispositive and that, since the Louisiana rule did not contain an exception to the waiver provision excusing defaults upon a showing of good cause, actual prejudice must be proved by defendant.[156] Accordingly,

153. Louisiana *ex rel.* Francis v. Henderson, No. 187-385-G (Crim. Dist. Ct., Orleans Parish, La., Dec. 20, 1971), *reprinted in* Appendix at 78, Francis v. Henderson, 425 U.S. 536 (1976) [hereinafter cited as *Francis* Appendix (state district court opinion)]. The judge who presided at the state habeas action was the same judge who conducted the trial. *See Francis* Appendix (state habeas proceedings), *supra* note 136, at 33. He took pains to specify that defendant had been ably represented by competent counsel of many years of experience. *See Francis* Appendix (state district court opinion), *supra* at 78; *cf.* Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 16 (1973) ("Some [trial judges] are not only willing but insistent on papering over the inadequacy or indifference of the lawyers practicing before them."). *See also* M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 89 (1975) ("[I]t was the practice of members of the prosecutor's office [in the District of Columbia] to put favorable comment about defense counsel into the trial record whenever they were concerned that the issue of ineffective representation might legitimately be raised on appeal.").

The state judge's high estimation of counsel's competence was not always reflected in the transcript of the state habeas proceeding. At one point, the judge accused cocounsel at Francis' original trial of guessing, *see Francis* Appendix (state habeas proceedings), *supra* note 136, at 42, and at another point he implied that counsel might distort the truth, *id.* at 48.

154. *See Francis* Appendix (federal district court opinion), *supra* note 138, at 87-92.

155. *See id.* at 90-91.

156. Newman v. Henderson, 496 F.2d 896 (5th Cir. 1974), *aff'd sub nom.* Francis v. Henderson, 425 U.S. 536 (1976). The Fifth Circuit was thus apparently taking the position that a state rule of criminal procedure that contained no provision excusing defaults on a showing of good cause could in effect amend the federal habeas statute so as to make the writ available only to state prisoners who could prove actual prejudice.

the case was remanded for a determination of that issue. On appeal, the Supreme Court affirmed, but went a step further, requiring that *both* good cause and actual prejudice be shown.[157]

The record thus indicates that none of *Noia*'s deliberate bypass requirements was met. It is unclear whether Francis' attorneys ever even considered the possibility of challenging the grand jury selection process. If they did, their determination against making such a challenge was apparently based on a desire not to waste time on what they seemingly considered a futile gesture,[158] and there was no strategic or tactical motive prompting this inaction.[159] Moreover, it is plain both that defendant did not participate in the "decision" to refrain from attacking the grand jury[160] and that this kind of determination was not a "trial-type" choice requiring an immediate utilization of legal expertise. Finally, defendant received what can only be described as ineffective assistance of counsel. Indeed, even taking into account the time and place of trial and the racial overtones of the crime, a fair reading of the Appendix submitted to the Court in *Francis* reveals

157. Francis v. Henderson, 425 U.S. 536, 542 (1976). Justice Brennan in his dissenting opinion stated that the prejudice requirement was unwarranted. *See id.* at 551-52. He also expressed the fear that the majority had erected a barrier that could very rarely be overcome; that is, according to the majority, petitioner would have to prove he would not have been indicted had the grand jury been selected in a constitutional manner. Further, Justice Brennan suggested that, if a prejudice requirement were to be imposed, the burden of proving that the error was harmless beyond a reasonable doubt should be placed on the state. Utilizing this standard, he found that, in view of defendant's age, the racial overtones of the crime, and the peculiarity of the felony murder involved, the state could not meet its burden of proof. *See id.* at 557-58.

158. *See* note 148 *supra.*

159. The absence of any strategic or tactical basis is clear since nothing could be lost by challenging the state on this issue. The prosecution was apparently unwilling to engage in any plea bargaining in Francis' case, *see* note 143 *supra* and accompanying text, and, indeed, was seeking imposition of the death penalty against a seventeen-year-old who had not himself committed the shooting, *see* note 136 *supra*, and whose older codefendants had been permitted to plead guilty to substantially lesser charges. Moreover, the felony murder theory being utilized was, to say the least, unusual. In such circumstances, counsel for the defendant would have everything to gain by asserting all conceivable defenses on behalf of their client. The presentation thereof would also possibly have afforded Francis' attorneys the additional time that they obviously thought they needed in view of their motion for a continuance.

160. At the state habeas hearing, Francis testified as follows:

Q. Were you informed either by your Counsel or by anyone that your attorneys had not attacked the make-up of the Grand Jury or Petit Jury on the basis of systematic exclusion of negroes [*sic*]?

A. No, I wasn't.

Q. Did you know anything about that at that time?

A. At that time, no.

Francis Appendix (state habeas proceedings), *supra* note 136, at 61.

counsel's inability to handle this capital case properly.[161] Though keeping in mind the dangers of judgments based on hindsight and the reality that Francis' attorneys were able to prevent imposition of the death penalty,[162] the level of effectiveness of assistance that the Supreme Court implicitly found sufficient to support a waiver[163] in

161. It should be noted that defendant's chief counsel, who was appointed two months after the indictment and who did not file any pretrial motions until the eve of trial four months later, was described by his cocounsel on the case as "a great civil lawyer," although chief counsel "hadn't handled any criminal matters for years." *Id.* at 31. Cocounsel described himself as "an expert criminal lawyer in capital cases," *id.* at 43, but his major role on Francis' behalf was in jury selection, *id.* at 41, and it was chief counsel who "did all the questioning and whatnot" at the one-day trial, *id.* at 31. In addition, cocounsel testified, "I came in as a trial expert to help [chief counsel] to select juries and whatnot. Things done previous thereto was [chief counsel's] business. . . . I can't question what he did four or five months before I came in as a trial expert and that's my job." *Id.* at 27.

Although cocounsel believed that Francis' confession was unconstitutionally obtained, *id.* at 34-35, he advised against an appeal, primarily because he believed that in the event of appeal defendant would be prosecuted on the underlying robbery and would receive a consecutive thirty-year sentence in addition to the sentence of life imprisonment already imposed. When asked whether defendant could have received such an additional sentence, cocounsel stated, "I don't know, I honestly don't know. You might think I am kidding you. I don't know. We thought so at this time." *Id.* at 37.

Finally, when asked whether in failing to appeal he and chief counsel thought they had been acting in the best interests of their client, cocounsel replied, "At that time [in 1965], yes." *Id.* at 46.

The point is not that Francis was represented by indifferent or incompetent attorneys. Chief counsel may well have been a "great civil lawyer," but that does not really bear on his ability to represent the defendant in a capital case. Cocounsel may have been "an expert criminal lawyer," but it was chief counsel who filed the pretrial motions and conducted the trial defense on behalf of Francis. As Judge Bazelon has noted, "[i]t is important to stress that the issue in ineffectiveness cases is not a lawyer's culpability, but rather his client's constitutional rights . . . . Even the best attorney may render ineffective assistance, often for reasons totally extraneous to his or her ability." United States v. DeCoster, 487 F.2d 1197, 1202 n.21 (D.C. Cir. 1973) (citations omitted).

Indeed, if anyone is a culprit in this instance, it is the State of Louisiana, which neglected to appoint defense counsel until two months after the indictment, provided no compensation for court-appointed counsel in a capital case, and admittedly assigned defense attorneys on the basis of race, *see* note 141 *supra*, rather than expertise in trying criminal cases. Finally, it was Louisiana that violated the Constitution by establishing a racially discriminatory procedure for grand jury selection.

162. Cocounsel for Francis testified that "everybody felt that the jury had been lenient on him because of his youth and he got a break that they didn't find him guilty as charged." *Francis* Appendix (state habeas proceedings), *supra* note 136, at 36. The additional factors of the bizarre nature of the felony murder charge and Francis' noninvolvement in the shooting may also have contributed to the jury's "leniency."

163. To be sure the majority studiously ignored the concept of waiver articulated in *Noia* and its requirement of consultation with competent counsel. By its reliance on *Davis*, the Court was finding a waiver by inaction and imputing counsel's omission

Francis meant, as suggested by Justice Brennan in dissent, either that the deliberate bypass doctrine was dead or that the right to challenge racially discriminatory grand jury selection procedures was an inferior constitutional claim.[164]

Without discounting the possibility that both of the foregoing hypotheses were correct, in light of contemporaneous decisions of the Court, the death of deliberate bypass seemed the more likely probability. First of all, in what might be considered a close case on the merits, the Court subsequently upheld a challenge to a racially discriminatory grand jury.[165] More significantly, in *Estelle v. Williams*,[166] a case decided on the same day as *Francis*, the Court determined for the first time that it was a denial of due process to "compel" a defendant to be tried in prison garb, but proceeded to rule that "the

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to the defendant. Although the majority did not disturb the federal district court's finding that the cause requirement had been satisfied by virtue of inadequate assistance of counsel, *see* note 155 *supra* and accompanying text, it held that actual prejudice was also required to be shown, affirming the Fifth Circuit, which had remanded for a determination on the prejudice issue. *See* Francis v. Henderson, 425 U.S. 536, 542 (1976), *aff'g sub nom.* Newman v. Henderson, 496 F.2d 896 (5th Cir. 1974).

164. *See id.* at 546, 551-53 & n.4 (Brennan, J., dissenting). For cases suggesting that constitutional claims relating to the grand jury are given low priority by the majority of the Court, see Tollett v. Henderson, 411 U.S. 258 (1973), *discussed at* notes 102-21 *supra* and accompanying text; Davis v. United States, 411 U.S. 233 (1973), *discussed at* notes 122-30 *supra* and accompanying text; Parker v. North Carolina, 397 U.S. 790, 798-99 (1970). In *Parker*, the defendant had failed to object to the composition of the grand jury. In a state collateral proceeding, the appellate court refused to consider his claim on the merits because of the default. On direct appeal therefrom, the Supreme Court stated,

> This state rule of practice would constitute an adequate state ground precluding our reaching the grand jury issue if this case were here on direct review . . . . We are under similar constraint when asked to review a state court decision holding that the same rule of practice requires denial of collateral relief . . . . Whether the question of racial exclusion in the selection of the grand jury is open in a federal habeas corpus action we need not decide.

Id. at 798.

165. Castaneda v. Partida, 430 U.S. 482 (1977). In this 5-4 decision, the Court held that charges of racial discrimination in the grand jury selection process, supported by proof of gross underrepresentation of Mexican-Americans on the grand jury, were not rebutted by the fact that the governing majority of the Texas county in question was itself Mexican-American. *See id.* at 499-500. Although defendant had not made a timely challenge to the grand jury, the Court reached the merits because the state courts had done so. *See id.* at 485 n.4. In his dissenting opinion, Justice Powell stated,

> A strong case may be made that claims of grand jury discrimination are not cognizable on federal habeas corpus after *Stone* v. *Powell* . . . . [T]he prisoner in this case challenges only the now moot determination by the grand jury that there was sufficient cause to proceed to trial. He points to no flaw in the trial itself.

Id. at 508 n.1.

166. 425 U.S. 501 (1976).

failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation."[167]

By its decision in *Williams* the majority drastically altered the law of waiver, which, as previously noted, is the analogue of deliberate bypass.[168] In a concurring opinion, two members of the Court in effect suggested counterpart modifications concerning the effect to be given state procedural defaults formerly governed by the deliberate bypass standard.[169] *Noia* was seemingly lost in the shuffle.

Because he was unable to supply bail, Williams was held in custody pending trial on an assault charge. Prior thereto, Williams' request to wear his "civilian" clothing at the trial was denied by the jailer.[170] No objection was made by defense counsel or the defendant at the trial.[171] In the course of an evidentiary hearing in the subsequent federal habeas action, the state court trial judge submitted an affidavit asserting that he would have granted a request to be tried in street clothes had one been made.[172] The United States District Judge found, however, that this practice of the trial judge was not well-known, that it was standard practice to try jailed defendants in their prison uniforms, and that " 'the evidence [pointed] to the strong likelihood that the trial climate at that time acted as a natural deterrent to the raising of objections to what was commonplace.' "[173] Indeed, Williams' state court attorney testified at the habeas hearing that he made no objection at trial since he deemed such action futile.[174] The Supreme Court majority suggested a possible strategic motive for such failure—eliciting jury sympathy[175]—and in that

167. *Id.* at 512-13.

168. *See* notes 39-40 *supra* and accompanying text.

169. 425 U.S. at 513 (Powell, J., joined by Stewart, J., concurring).

170. *Id.* at 502, 510.

171. *Id.*

172. *Id.* at 511 n.6. As Justice Brennan pointed out in dissent, the defendant had objected to introduction of the judge's affidavit since it gave counsel no opportunity to cross-examine the judge concerning the number of times such objections had actually been made. *Id.* at 534 n.15.

173. *Id.* at 530 (Brennan, J., dissenting) (quoting the district court opinion) (emphasis deleted).

174. *See id.* at 531 (Brennan, J., dissenting); *cf. id.* at 511 n.7 (defense counsel had been overruled by a different state judge on such an objection and had seen other defendants in prison uniform in the courtroom where his client was tried).

175. *See id.* at 510 n.5. Chief Justice Burger observed that since the defendant was a "Caucasian in his sixties" and since the evidence was "clear and consistent . . . a desire to elicit jury sympathy would have been a reasonable approach." *Id. But see id.* at 533 (Brennan, J., dissenting) ("I do not share the Court's view of the strength of the trial evidence . . . ."). In its opinion, the Fifth Circuit implied that defendant could have been either acquitted or convicted of a lesser included assault since

connection noted that defense counsel had himself called attention to the jail uniform during voir dire.[176] Apparently, however, the latter action by trial counsel had been taken only after the prosecutor had raised the matter with the prospective jurors.[177] In any event, at the federal habeas hearing, the state conceded that trial tactics were not involved in defendant's failure to object.[178] The federal district court denied relief on the ground that the error committed was in this case harmless.[179] The Fifth Circuit reversed, agreeing with the district court that there had been no voluntary waiver by defendant of the implicated right, but disagreeing with the determination that the error was harmless.[180]

The Supreme Court, reversing the Fifth Circuit, acknowledged that prosecution of a defendant wearing prison garb was a denial of a fair trial because it impaired the accuracy of the fact-finding procedure by undermining both the presumption of innocence and the standard requiring proof of guilt beyond a reasonable doubt.[181] Having made this determination, the Court nonetheless found that the right to appear in street clothes was "waived" by defendant's failure to object at trial, notwithstanding the trial judge's failure to apprise Williams of his "right." The test thus established for violation of the right not to be tried in jail clothing was whether the state had "compelled" defendant to appear in such a uniform.[182] Although, as noted, the majority suggested possible strategic motives for waivers of this kind, the Court found it unnecessary to determine whether failure to object "was a defense tactic or simply indifference. In either

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"Williams faced a heavier opponent who was accompanied by an armed ally." The Court of Appeals determined that "[t]he evidence in this case is not so strong as to warrant the conclusion that the constitutional error of trying Williams in prison garb was harmless." Williams v. Estelle, 500 F.2d 206, 210-11 (5th Cir. 1974), *rev'd*, 425 U.S. 501 (1976).

176. *See* 425 U.S. at 510.

177. *Id.* at 532 & n.12 (Brennan, J., dissenting).

178. *Id.* at 531 n.11 (Brennan, J., dissenting).

179. Williams v. Beto, 364 F. Supp. 335, 343-44 (S.D. Tex. 1973), *rev'd sub nom.* Williams v. Estelle, 500 F.2d 206 (5th Cir. 1974), *rev'd*, 425 U.S. 501 (1976).

180. *See* Williams v. Estelle, 500 F.2d 206, 208, 211-12 (5th Cir. 1974), *rev'd*, 425 U.S. 501 (1976). Although the Supreme Court majority opinion cited a prior Fifth Circuit decision, Hernandez v. Beto, 443 F.2d 634 (5th Cir.), *cert. denied*, 404 U.S. 897 (1971), in support of the proposition that the accused must object to being tried in jail clothing, 425 U.S. at 508, in fact, the defendant in that case had made no objection at the trial level, and the Fifth Circuit nonetheless reversed his conviction. *See* 443 F.2d at 636.

181. *See* Estelle v. Williams, 425 U.S. 501, 503-06 (1976). The Chief Justice also found it "troubling" that the defendants who were "forced" to stand trial in jail clothing were those who could not post bail, thus raising equal protection concerns. *Id.* at 505-06.

182. *See id.* at 512.

case, respondent's silence precludes any suggestion of compulsion."[183]

In promulgating this compulsion test for waiver, the Court, in an otherwise cryptic footnote,[184] was necessarily obliged to announce that waiver of the due process right to be tried in street clothing was not governed by the *Johnson v. Zerbst* standard requiring intelligent relinquishment of a known right. According to the majority, that standard applied only to "a fundamental right," leaving unclear whether the *Johnson* test was limited solely to the right to counsel, which was the right involved in *Johnson* itself, or whether it applied to other unspecified "fundamental" rights.[185] In view of the present Court's preoccupation with factual guilt and innocence,[186] the Chief

183. *Id.* at 512 n.9.

184. *Id.* at 508 n.3. The footnote reads in relevant part:

> We are not confronted with an alleged relinquishment of a fundamental right of the sort at issue in *Johnson* v. *Zerbst* . . . . There, the Court understandably found it difficult to conceive of an accused making a knowing decision to forgo the fundamental right to the assistance of counsel, absent a showing of conscious surrender of a known right. The Court has not, however, engaged in this exacting analysis with respect to strategic and tactical decisions, even those with constitutional implications, by a counseled accused. See, *e. g.*, *On Lee* v. *United States*, 343 U.S. 747, 749 n.3 (1952). Cf. Fed. Rule Crim. Proc. 11.

Id. (citation omitted).

185. *See id.* Presumably through his "*cf.*" citation to Rule 11 of the Federal Rules of Criminal Procedure, *see* note 184 *supra*, the Chief Justice intended to suggest that guilty pleas involved fundamental rights that could not be relinquished unknowingly, even by a counseled defendant.

Elsewhere in the opinion, however, Chief Justice Burger stated that the trial judge was under no obligation to determine from defendant or defense counsel whether the former was "deliberately going to trial in jail clothes." He noted,

> To impose this requirement suggests that the trial judge operates under the same burden here as he would in the situation in *Johnson* v. *Zerbst* . . . , where the issue concerned whether the accused willingly stood trial without the benefit of counsel. Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney.

Id. at 512 (citation omitted).

In his concurring opinion in Wainwright v. Sykes, 433 U.S. 72 (1977), the Chief Justice made it clear that he thought counsel was empowered to make all decisions regarding assertion of constitutional rights at trial, *see id.* at 93, except that the client had the ultimate right to determine whether to plead guilty, waive a jury, or testify in his or her own behalf, *id.* at 93 n.1.

186. *See, e.g.*, Hankerson v. North Carolina, 432 U.S. 233, 242 (1977) (applying Mullaney v. Wilbur, 421 U.S. 684 (1975), which implemented the reasonable doubt standard, retroactively; "the rule was designed to diminish the probability that an innocent person would be convicted"); Blackledge v. Allison, 431 U.S. 63, 84 (1977) (Powell, J., concurring) (commenting on our "uniquely elaborate system of appeals and collateral review, even in cases in which the issue presented has little or nothing to do with innocence of the accused"); Brewer v. Williams, 430 U.S. 387, 415 (1977)

Justice's announcement of the waiver-absent-compulsion rule seems particularly inappropriate in the context of a case involving a due process right whose loss, the Court acknowledged, may undermine the accuracy of the fact-finding process.[187]

Stranger still, in light of the majority's determination that tactics were irrelevant to the decision in this case, was the Court's assertion in the same footnote that it had not previously utilized the "exacting analysis" of the *Johnson* waiver standard in regard to "strategic and tactical decisions, even those with constitutional implications, by a counseled accused."[188] In support of this proposition, the Chief Justice cited a footnote in *On Lee v. United States,*[189] a 1952 fourth amendment misplaced trust case in which the Court held it permissible for a government agent to testify to a conversation between defendant and a wired informant who was simultaneously transmitting the incriminating statements to the agent.[190]

The *On Lee* footnote contains a discussion of counsel's failure to make a specific objection raising defendant's constitutional claim at trial.[191] The *On Lee* Court concluded, however, that the federal intermediate appellate court's apparent treatment of this issue as one of plain error justified a determination on the merits.[192] Although reiterating the importance of timely, specific objections, the Court in *On Lee* made no reference to strategy or tactics as a possible basis for the failure to object.[193] Thus, as primary authority for a novel interpreta-

(Burger, C.J., dissenting) (urging that *Stone v. Powell* be applied to fifth and sixth amendment claims, where, as in this case, the evidence is reliable and where the constitutional claim is irrelevant "to the criminal defendant's factual guilt or innocence"); Stone v. Powell, 428 U.S. 465, 490 (1976) ("[T]he physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant."). *But see* Patterson v. New York, 432 U.S. 197, 208 (1977) ("Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.").

187. *See* 425 U.S. at 504-05. Apparently, however, the Chief Justice believed that the evidence against Williams was so strong that there could be no doubt as to his guilt. *See id.* at 510 n.5. *But see* note 175 *supra.*

188. 425 U.S. at 508 n.3.

189. 343 U.S. 747, 749 n.3 (1952).

190. The *On Lee* decision was 5-4 with Justices Frankfurter, Black, Douglas, and Burton dissenting. In a wide-ranging, philosophical exposition, Justice Frankfurter stated, "Loose talk about war against crime too easily infuses the administration of justice with the psychology and morals of war. It is hardly conducive to the soundest employment of the judicial process." *Id.* at 758.

191. Defense counsel made a general objection that the Court found insufficient to preserve the specific constitutional claim. The Court also indicated that the probable basis for the attorney's objection was irrelevance. *See id.* at 749 n.3.

192. *See id.* (citing FED. R. CRIM. P. 52(b)).

193. *See id.* It was reasonably clear that the failure to object stemmed from counsel's inability to make a proper objection rather than from strategic or tactical motives. *See* note 191 *supra.*

tion of the *Johnson v. Zerbst* waiver rule, the *Williams* Court relied on a footnoted aside in a pre-*Noia* case involving a direct appeal by a federal prisoner in which the Court decided the constitutional issue on the merits without mentioning *Johnson v. Zerbst*.

The majority's newfound and unprecedented waiver theory is disturbing on several counts. First, as noted above, it seems calculated to limit the *Johnson v. Zerbst* standard for in-court waivers of constitutional rights to the right to counsel and other "fundamental" rights, but it gives no guidelines for determining which rights are to be deemed "fundamental." The implication is that any other constitutional rights not asserted at trial are waived,[194] either because the state has not compelled the relinquishment of the particular right or because, once an attorney has been appointed or retained, rights may be lost by virtue of counsel's inaction, regardless of whether counsel or defendant is aware of the existence of the right or intends to give it up.

Second, the waiver-absent-compulsion test announced in *Williams* dilutes due process rights by making their existence dependent on the actions of the defense attorney,[195] even in a case in which

194. It is not clear what rights the *Williams* Court considered "fundamental" other than the right to counsel and the right not to plead guilty. *See* notes 184-85 *supra*. While it might seem appropriate to apply the *Johnson v. Zerbst* standard of waiver to all rights affecting the fairness or accuracy of the fact-finding process and to apply the new standard of waiver absent compulsion to all other constitutional rights (even those enumerated in the Bill of Rights), the line cannot be drawn in that manner because the right involved in the *Williams* case itself was one affecting the accuracy of the fact-finding process. Thus, for example, it is unclear whether defense counsel's failure to object to the omission from the trial judge's instructions to the jury of any mention of the reasonable doubt standard would constitute a waiver of that constitutional right clearly affecting determination of the guilt or innocence of the accused. *Compare* Estelle v. Williams, 425 U.S. 501, 521 n.5 (1976) (Brennan, J., dissenting), *with* Henderson v. Kibbe, 431 U.S. 145, 157-58 (1977) (Burger, C.J., concurring). Conversely, while the right to a jury trial is "fundamental to the American scheme of justice," Duncan v. Louisiana, 391 U.S. 145, 149 (1968), it has not been deemed "a necessary component of accurate factfinding," McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971) (plurality opinion). Yet, Chief Justice Burger would apply the *Johnson v. Zerbst* standard of waiver with respect to the right of trial by jury. *See* Wainwright v. Sykes, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring). Thus, although waiver of federal constitutional rights is a question of federal law, *see* Fay v. Noia, 372 U.S. 391, 439 (1963), the *Williams* case gives no analytical framework for determining which of the two standards for waiver will be applied to any particular constitutional right.

195. While Chief Justice Burger stated in *Williams* that "the vast array of trial decisions . . . rests with the accused and his attorney," 425 U.S. at 512, and that neither defendant nor his counsel raised any objection, *id.* at 502, the implication is that the decision whether to assert an objection at trial is ultimately one for the attorney to make. If the accused does have a role to play in objecting to trial in jail uniform, it would appear that Williams asserted this claim in the only way that a layperson could be expected to bring out the matter, that is, by asking his jailer if he

the defendant had been asserting ineffective assistance of counsel.[196] The majority in *Williams* conceded that there was sufficient authority to alert defendant's attorney to the existence of the forfeited right,[197] and the state had stipulated at the federal habeas hearing that counsel's inaction was not tactically motivated.[198] The Court stated, however, that even if the failure to object resulted from indifference, the right would be deemed waived.[199] The implication of this holding, therefore, is that a constitutional claim affecting the accuracy of the fact-finding process could be waived notwithstanding

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could be tried in his street clothing. *See id.* at 502.

If, on the other hand, counsel is responsible for asserting the right in question and fails to make the objection at trial or to consult with defendant in this regard, and if such failure to object need not be based on strategy or tactics, it is unclear how the right to counsel secures defendant any benefit with respect to the implicated constitutional right. Indeed, when the Court held in Faretta v. California, 422 U.S. 806 (1975), that the sixth amendment included the right to self-representation, the Chief Justice dissented, stating that "both the 'spirit and the logic' of the Sixth Amendment are that every person accused of crime shall receive the fullest possible defense; in the vast majority of cases this command can be honored only by means of the expressly guaranteed right to counsel." *Id.* at 840. The "fullest possible defense" is not received by a defendant who represents himself since in all but an extraordinarily small number of cases an accused will lose whatever defense he may have if he undertakes to conduct the trial himself. *Id.* at 838. Query: If Williams had proceeded to trial without an attorney, would the trial judge have had an obligation to inform him of his due process right not to be tried in jail clothing, and absent such advice by the court, would Williams be deemed to have waived his constitutional right? As the Chief Justice observed in *Faretta*,

> the reported cases are replete with instances of a convicted defendant being relieved of a deliberate decision even when made *with the advice of counsel.* . . . It is totally unrealistic, therefore, to suggest that an accused will always be held to the consequences of a decision to conduct his own defense.

Id. at 845-46 (citation omitted).

196. *See* 425 U.S. 501, 534 n.15 (Brennan, J., dissenting). The ineffective assistance claim had not been addressed by the Fifth Circuit, apparently because of its determination with respect to the prison uniform issue. *See id.* The district court had rejected the contention in a one-paragraph discussion. *See* Williams v. Beto, 364 F. Supp. 335, 339 (S.D. Tex. 1973), *rev'd sub nom.* Williams v. Estelle, 500 F.2d 206 (5th Cir. 1974), *rev'd*, 425 U.S. 501 (1976). The Texas appellate court had rejected the claim because "the record as a whole" showed that the trial was not "a farce or mockery of justice" or the representation "perfunctory, in bad faith, sham, pretense, or without adequate opportunity for conference or presentation." Williams v. State, 477 S.W.2d 24, 27 (Tex. Crim. App. 1972).

197. *See* 425 U.S. at 511 n.8 ("[T]hese [Texas] cases provided ample grounds for objection to the procedure, since they at least implicitly recognized that reversible error could result from the practice."). The foregoing statement buttresses the suggestion that the Court intended to make counsel responsible for asserting the right in question since a layperson would normally not be familiar with case law. *See* note 195 *supra.*

198. *See* 425 U.S. at 531 & n.11, 534 n.15 (Brennan, J., dissenting).

199. *See id.* at 512 n.9.

ineffective assistance of counsel with respect to the particular claim.[200] Having granted the right to counsel in criminal cases, the Court may deem it appropriate to establish guidelines concerning the extent to which counsel's action will bind the accused. If this is the goal, the Court's groping attempt to do so without addressing the relationship of a waiver of a constitutional claim to the issue of competence or to the circumstances in which an attorney's actions may be properly imputed to his or her client[201] is clearly unacceptable.

Even more disquieting, at least with respect to development of the law of federal habeas corpus, is Justice Powell's concurring opinion, which ostensibly distinguished between true waivers, in which the substantive right is extinguished because defendant voluntarily gives it up, and procedural defaults, which preclude determinations on the merits of the claim.[202] In fact, the concurrence blurs the distinction and virtually collapses the two doctrines into one, making it impossible to distinguish waivers from defaults.[203] The doctrine that

200. Even if counsel were thoroughly effective during the remainder of the trial, his or her indifference with respect to assertion of the constitutional right in question would amount to ineffective assistance with respect to that right. The Court in *Williams* appears to be saying that even in such circumstances the right not to be tried in jail clothing is waived.

Utilization of the alternate theory of compulsion suggested by Chief Justice Burger does not obviate the need to discuss how, when, and by whom the right can be given up. The only reference in the Bill of Rights to compulsion is with respect to the fifth amendment privilege against self-incrimination. Even in that context, the defendant's loss of the right is premised on a knowing and intelligent relinquishment thereof. *See id.* at 516 n.2 (Brennan, J., dissenting). Indeed, in each of two recent decisions finding Miranda v. Arizona, 384 U.S. 436 (1966), inapplicable, the Court noted that although full *Miranda* warnings had not been given, the defendants had at least been advised generally of their rights under the fifth amendment. *See* United States v. Mandujano, 425 U.S. 564 (1976); Beckwith v. United States, 425 U.S. 341 (1976).

201. For example, an objection to wearing a jail uniform can be discussed in advance with the defendant, who is fully capable of understanding the consequences of not asserting the claim. On the other hand, there may be instances when the attorney will be required to decide instantaneously, without consulting the accused, whether to object to unanticipated hearsay evidence that implicates the sixth amendment rights to confrontation and cross-examination. *See generally* notes 289-304 *infra* and accompanying text.

202. *See* 425 U.S. at 513-15 (Powell, J., concurring); *cf.* notes 38-40 *supra* and accompanying text (distinguishing waivers and deliberate bypasses).

203. Justice Powell never stated whether he viewed the loss of the right in *Williams* as a waiver or as a default. On the one hand, he began his opinion by stating, "I concur in the opinion of the Court," thus suggesting his acceptance of the majority's waiver theory, whether based on compulsion or inaction. On the other hand, his discussion of inexcusable defaults can be read as adopting a theory of procedural default with respect to loss of the right to assert the implicated constitutional right. Justice Brennan found it "puzzling" that Justices Powell and Stewart could concur in the majority opinion and, at the same time, utilize in their own opinion a procedural default theory that, in his view, "obfuscate[d] various issues." *Id.* at 523 (Brennan, J., dissenting).

emerges is that, absent plain error, counsel's failure to make an objection as to curable "trial-type" constitutional errors is, as a matter of federal law, an "inexcusable procedural default" that precludes later assertion of the right.[204]

The concurring opinion apparently found the default in question to be inexcusable because Williams was "represented by retained, experienced counsel" who knew that trial of a defendant in jail clothing raised a constitutional question and whose objection to the state trial judge would have permitted the constitutional infirmity to be cured[205] and who failed to object because he thought it would be futile to do so.[206] Additionally, the failure to object with respect to the "trial-type" right involved was "susceptible of interpretation as a tactical choice."[207]

Since the concurring opinion effectively merged the concepts of waiver and deliberate bypass into a procedural default theory, there was a clear obligation to discuss *Fay v. Noia* meaningfully, instead

204. *Id.* at 513 (Powell, J., concurring) (quoting Hart, *supra* note 15, at 118). Since the error involved was one affecting the integrity of the fact-finding process and was clearly observable by the trial court, *see id.* at 516 n.1 (Brennan, J., dissenting), and since both the majority and concurring opinions viewed the constitutional right in question as one that should have been well-known to the attorney, it is unclear why the trial judge should not have been charged with the same degree of knowledge and responsibility as defense counsel and should not have been obliged to inquire as to defendant's reason for appearing in a jail uniform. Furthermore, such an inquiry by the trial judge would have occurred before trial and would not have disrupted the proceedings.

205. *See id.* at 514 (Powell, J., concurring). The concurring opinion thus accepted at face value the state trial judge's affidavit that he granted all requests to be tried in street clothing. While the federal district court accepted the judge's affidavit, the court went on to note that the state judge's practice was not well-known, that it was standard practice at the time to have defendants in custody tried in their jail uniforms, and that the trial climate acted as a natural deterrent to making such objections. *See* Williams v. Beto, 364 F. Supp. 335, 343 (S.D. Tex. 1973), *rev'd sub nom.* Williams v. Estelle, 500 F.2d 206 (5th Cir. 1974), *rev'd*, 425 U.S. 501 (1976).

206. Justice Powell's refusal to accept "experienced" counsel's statement that an objection would have been futile as a basis for not imposing a forfeiture is arguably at odds with his concern that attorneys clog up the courts with unwarranted objections. In Argersinger v. Hamlin, 407 U.S. 25 (1972), which held that defendants in misdemeanor cases could not be sentenced to jail unless they were offered the assistance of counsel, Justice Powell, although concurring in the result, opposed such a per se rule, contending that the issue should instead be resolved on a case-by-case basis. He observed that

> the Court's rule may well exacerbate delay and congestion in these courts. We are familiar with the common tactic of counsel of exhausting every possible legal avenue, often without due regard to its probable payoff . . . . [T]he omnipresent ineffective assistance of counsel claim, frequently produces a decision to litigate every issue.

Id. at 58.

207. 425 U.S. at 514 (Powell, J., concurring).

of citing it in a footnote for the proposition "that a federal-law bar can be raised to the untimely presentation of constitutional claims."[208] *Noia*'s deliberate bypass test placed the burden of proof on the state to show that defendant, after consultation with competent counsel, made a personal, tactical decision to forgo state remedies for assertion of his or her constitutional claim. In *Williams*, however, defendant had attempted to assert his constitutional right by asking the jailer for his regular clothes, he had claimed ineffective assistance of counsel, and it was conceded there was no tactical basis for the default.

While the concurring Justices properly cited *Henry* as authority for the proposition that "an attorney's conduct may bind the client,"[209] they failed to come to grips with the considerations that may have prompted the *Henry* Court to conclude that imputation of the attorney's omissions to the client might be proper under the facts of that case—considerations that were not present in *Williams*. Thus, no attempt was made to distinguish *Henry*, even though that case involved a fourth amendment claim about which counsel might arguably have had no opportunity to consult with the client before trial,[210] whereas the claim involved in *Williams* was one that could have been discussed fully with the accused prior to the decision whether to assert it. Furthermore, the effect of nonassertion of the constitutional issue in *Henry* might be deemed more difficult to explain to a layperson than the straightforward nontechnical claim involved in *Williams*. Stated another way, the necessity for immediate, midtrial, unilateral action by counsel possessing expertise with respect to the claim may have been present in *Henry*, but was clearly absent in *Williams*. Moreover, in the *Henry* situation a trial judge's inquiry as to whether a fourth amendment objection was being waived could conceivably be viewed as an uninformed interference with counsel's handling of the case, whereas no such considerations would preclude a judge who saw defendant going to trial in prison garb from making a pretrial inquiry as to whether the accused wished to give up his or her constitutional right to be tried in street clothing. Finally, under *Henry*, counsel's default is binding on the client only if there is a finding that the attorney's failure to assert the constitutional claim was a tactical decision; yet, as already noted, in *Williams* it was stipulated that counsel's default was not tactically motivated.

In place of the *Noia-Henry* standard, Justice Powell suggested that, in regard to most trial-type rights, "counsel's failure to object

208. *Id.* at 515 n.3 (Powell, J., concurring).
209. *Id.* at 515 n.4 (Powell, J., concurring).
210. *But see* text accompanying notes 58-59 *supra*.

in itself is susceptible to interpretation as a tactical choice."[211] This suggestion is clearly contrary to the requirement of both *Noia* and *Henry* that the Court focus on the particular case in order to determine whether, in fact, the default was strategically or tactically motivated.[212] Thus, here, as in *Francis,* the failures of counsel are effectively converted into legal strategems that form the justification for imposing forfeitures.

Substitution of such a rule of procedural default for *Noia*'s deliberate bypass test has an undesirable impact on federalism. The purpose of the bypass doctrine was to assure that defendants utilized orderly state procedures for vindication of their constitutional rights by directing the federal habeas court to look initially at whether the state courts had refused to consider the merits of the federal claim because of a state procedural default. If, however, a state proceeded to determine the merits of the claim notwithstanding a default, federal habeas would lie because defendant's procedural error had not cut off his or her state remedies.[213] If a state court did not wish to impose a forfeiture, considerations of federalism, comity, or equity did not require the federal court to refuse to entertain the petition.[214] While it is true that, as in *Williams,* the same omission or failure to object can amount to either a true waiver of the right or a procedural default under state law (which is the reason the two are often confused),[215] the rockbottom test for determining which one is involved is an examination of how the state court treats the omission in question.[216] In *Williams,* the state court had treated the issue as one of

211. 425 U.S. at 515 (Powell, J., concurring).

212. As noted in Justice Brennan's dissent, the concurring opinion "directly repudiate[d] *Fay* [v. *Noia*]," rendering the deliberate bypass test "a hollow shell." *Id.* at 525-26.

213. *See, e.g.,* Warden v. Hayden, 387 U.S. 294, 297 n.3 (1967); Lussier v. Gunter, 552 F.2d 385, 388 (1st Cir.), *cert. denied,* 98 S. Ct. 171 (1977).

214. Conversely, if the state court did wish to impose a procedural default on the basis of state law without reaching the merits of the federal claim, the federal court would apply the deliberate bypass test to determine the appropriateness of reaching the merits in the federal habeas action.

215. Confusion between the concepts of waiver and procedural default is made more acute by the majority opinion in *Williams,* which finds a waiver on the basis of either noncompulsion or inaction, rather than on the basis of intentional relinquishment of a known right. Whereas prior to the *Williams* decision a state court was obliged to discuss waiver in terms of a knowing relinquishment, it can now apparently do so in terms of inaction, which can also constitute a procedural default under state law. It thus becomes more difficult to ascertain the theory on which the state court has proceeded.

216. Indeed, even when the state court has refused to consider the constitutional issue on the merits because of a procedural default under state law, but the state attorney general has declined to raise the default as a defense in the federal habeas action, instead seeking a determination on the merits, the federal court has determined

waiver rather than procedural default by going to the merits of whether, under federal law, Williams had voluntarily given up his right to be tried in civilian clothing.[217]

Justice Powell's analysis of procedural default thus seems at odds with his own concept of federalism[218] since the analytical framework he suggests has the effect of disregarding the state's decision to treat the error on the merits—that is, as a waiver—rather than to treat it as a procedural default under state procedural rules. In *Stone v. Powell*,[219] for example, Justice Powell emphasized the "constitutional obligations" of state and federal courts to "safeguard personal liberties and to uphold federal law,"[220] found the state courts fully capable of doing so, and held that so long as a state "provided an opportunity for full and fair litigation of a Fourth Amendment claim" federal habeas would not lie.[221] This willingness to place considerable confidence in state court determinations contrasts with Justice Powell's insistence in *Williams* on treating the question as merely one of procedural default notwithstanding the state court's willingness to resolve a federal constitutional waiver claim. The effect of merging the doctrines of waiver and bypass into a new theory of inexcusable procedural default is to encourage state courts not to make decisions on the merits concerning waiver of constitutional claims, but instead merely to find defaults. Indeed, according to the concurrence, even if the state court wishes to resolve an issue on the basis of the federal law of waiver, as it did in *Williams*, that determination is given no effect in the federal habeas action. Any federal rule

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that "[t]he interest of the state in protecting its procedural rules seems somewhat diminished here by the fact that on this appeal the Attorney General of New York has not even argued or briefed the theory that [defendant] deliberately bypassed his right to object to the trial judge's charge." Kibbe v. Henderson, 534 F.2d 493, 496 n.4 (2d Cir. 1976), *rev'd on other grounds*, 431 U.S. 145 (1977).

217. *See* Williams v. State, 477 S.W.2d 24, 26-27 (Tex. Crim. App. 1972). Although also citing a state court decision on this issue, the court relied on a Fifth Circuit decision, stating, "Absent an objection, it is presumed that [defendant] was willing to go to trial in jail clothing." *Id.* at 26; *see* Estelle v. Williams, 425 U.S. 501, 526 (1976) (Brennan, J., dissenting) ("The Texas Court of Criminal Appeals did not render its decision on state procedural grounds but on its view of federal waiver doctrine . . . . The issue of procedural default was never raised by the State or addressed by any court below . . . .").

218. While Justice Powell's views on federalism can hardly be boiled down to a few cliches, *compare* Patterson v. New York, 432 U.S. 197, 216 (1977) (dissenting opinion), *with* Stone v. Powell, 428 U.S. 465 (1976), it is probably fair to characterize his concept of federalism as including a greater respect for state court determinations and a more expansive view of the role of the states in the federal system. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651 (1977); Stone v. Powell, 428 U.S. 465 (1976).

219. 428 U.S. 465 (1976).

220. *Id.* at 493 n.35.

221. *Id.* at 494.

that implicitly sanctions disregard of a state court's decision to grapple with the merits of a constitutional waiver claim hardly fosters full participation by the states in the adjudication of federal constitutional issues.

Taken together, the majority and concurring opinions in *Williams* suggested, to say the least, a rather bleak future for both the law of waiver in the *Johnson v. Zerbst* sense and the law of deliberate bypass. The majority did not deign to cite *Fay v. Noia*, perhaps because it was proceeding on a straight waiver theory. Since waiver is the analogue of deliberate bypass, however, any change in the law of waiver necessarily implicates deliberate bypass.

Noia's bypass test was tied to the *Johnson v. Zerbst* waiver standard to assure symmetry between relinquishment of a substantive right and loss of the right to assert the claim by failure to comply with state procedural rules. There is every reason to maintain such symmetry because, whether a waiver or a deliberate bypass is found, the constitutional right is lost.[222] To have a less stringent test than deliberate bypass in the case of state procedural defaults would in effect permit a state, by its procedural rules, to amend the federal law of waiver.[223] For example, assume that a state required an indigent defendant at arraignment affirmatively to request the appointment of an attorney and provided that absent such a request the right to counsel was lost. The state's imposition of a forfeiture for failure to abide by this procedural rule would, if accepted by the federal habeas court, constitute a change in the federal law of waiver, which under *Johnson* requires a voluntary relinquishment of a known right.[224] If

222. *See* Francis v. Henderson, 425 U.S. 536, 548 n.2, 553 n.4 (1976) (Brennan, J., dissenting); Estelle v. Williams, 425 U.S. 501, 527 n.8 (1976) (Brennan, J., dissenting); text accompanying notes 38-40 *supra*.

223. *See* Francis v. Henderson, 425 U.S. 536, 548 n.2 (1976) (Brennan, J., dissenting):

> If, as a matter of constitutional law, a substantive constitutional right (for example, the right to counsel or the right to a speedy trial) may not be lost unless it has been knowingly and intelligently waived by the defendant, . . . it is difficult to fathom how the existence vel non of a state procedural rule that a claim to that right must be asserted at a particular time can in any way dilute that constitutional waiver standard.

To the extent that the *Johnson v. Zerbst* standard remains applicable with respect to particular constitutional rights, such as the right to counsel, presumably *Noia*'s deliberate bypass standard will continue to apply in assessing the effect of a state procedural default.

224. *Id.* If the majority's modification of the law of waiver is limited to "trial-type" rights lost after counsel has been appointed and if the effect to be given state law defaults is similarly limited, *see* Estelle v. Williams, 425 U.S. 501, 512 (1976); *id.* at 514 (Powell, J., concurring), it remains unclear whether, for example, a state law requiring a request to charge with respect to the reasonable doubt standard and providing that the right to such jury instruction is lost absent a request therefor will be given preclusive effect in a federal habeas action. *See id.* at 526-28 (Brennan, J., dissenting).

federal law is modified to permit such a waiver by inaction or omission, the parallelism between waiver and state procedural defaults resulting from failure to object is restored. The cost of achieving this symmetry, however, is to dilute the standard by which federal constitutional rights can be lost.

Accordingly, when the majority in the *Williams* case changed the federal law of waiver, the concurring opinion sought to bring the law with respect to state procedural defaults into line with the new waiver law, thus restoring symmetry between the two doctrines. In view of the substantial alteration of the law of waiver and the law of deliberate bypass in *Williams,* however, there was an obligation on the part of both the majority and the concurrence to examine the relationship between these two doctrines and to acknowledge the effect of *Williams* on *Noia* and deliberate bypass, instead of giving *Noia* "the silent treatment."[225]

In sum, beginning as early as the *Henry* opinion in 1965, the Court had made inroads on *Noia*'s strict deliberate bypass requirements. With its decisions in 1972 and 1973 of the *Mottram, Tollett,* and *Davis* cases, the Court substantially expedited this erosion. Finally, by the end of its October 1975 Term, with the decisions in *Francis* and *Williams,* the Supreme Court had developed a rather substantial body of habeas law, which imposed forfeitures in the absence of any showing of a strategic basis for the default in the particular case or of personal participation by the defendant in the decision to forgo state remedies for assertion of constitutional claims. Yet *Noia*'s deliberate bypass requirement had not been explicitly overruled.

II. *WAINWRIGHT v. SYKES*: THE DOCTRINE IS DEAD, LONG LIVE THE . . . ?

Fay v. Noia could not be ignored forever. Justice Brennan's stinging dissents,[226] as well as expressions of mystification from legal

225. *See* HART & WECHSLER, *supra* note 47, at 257.

226. *See* Francis v. Henderson, 425 U.S. 536, 542-58 (1976) (Brennan, J., dissenting); Estelle v. Williams, 425 U.S. 501, 526-28 (1976) (Brennan, J., dissenting). Justice Brennan was concerned not only with the merits of the changes being effected, but also with the failure of the majority "to develop and explicate the law in a reasoned and consistent manner" and "to face squarely our prior cases interpreting the federal habeas statutes and honestly state the reasons, if any, for its altered perceptions of federal habeas jurisdiction." Francis v. Henderson, 425 U.S. 536, 547 (1976). He added, "I, for one, do not relish the prospect of being informed several Terms from now that the Court overruled *Fay* [*v. Noia*] this Term . . . , when the Court never comes to grips with the constitutional statutory principles and policy considerations underpinning that case." *Id.* Justice Brennan was overly optimistic in suggesting that *Noia*'s specific overruling would not take place for several Terms; Wainwright v. Sykes, 433 U.S. 72 (1977), was decided the following Term.

scholars, including those who could hardly be described as enthusiastic proponents of broad federal habeas jurisdiction,[227] could not go unheeded indefinitely. More important, depending in part on their predilections, lower federal court judges were left to opt for *Noia* or for the *Davis-Francis-Williams* line of cases in determining the effect of procedural defaults.[228] Thus, unless *Noia*'s deliberate bypass doc-

227. *Compare* HART & WECHSLER, *supra* note 47, at 256-58 (Supp. 1977), *with* Bator, *supra* note 15, at 442-44, *and* Hart, *supra* note 15, at 101-25.

228. *See, e.g.*, Turnbough v. Wyrick, 551 F.2d 202, 204 (8th Cir.) (finding that case was governed by *Francis* and *Williams* rather than *Noia*), *cert. denied*, 431 U.S. 941 (1977); Poulin v. Gunn, 548 F.2d 1379 (9th Cir.) (per curiam) (defendant's failure to object not a deliberate bypass; reliance placed on *Noia* and *Henry* without citing *Francis* or *Williams*), *vacated mem.*, 98 S. Ct. 424 (1977); Reese v. Ricketts, 534 F.2d 1180, 1181 (5th Cir. 1976) (district court finding of deliberate bypass not clearly erroneous where court had relied "on the waiver by deliberate bypass theory of *Fay v. Noia* . . . rather than waiver by procedural default, *see Francis v. Henderson*"); Arnold v. Wainwright, 516 F.2d 964, 967 (5th Cir. 1975) (finding *Davis* rather than *Noia* controlling in context of petit jury challenges), *cert. denied*, 426 U.S. 908 (1976).

The tension created by the two conflicting lines of cases is perhaps best illustrated by Gates v. Henderson, 568 F.2d 844, *vacated on rehearing en banc*, 568 F.2d 830 (2d Cir. 1977), *cert. denied*, 98 S. Ct. 775 (1978). The original panel reversed the dismissal of a section 2254 petition, holding that defendant had not been afforded a full and fair opportunity to litigate his fourth amendment claim in state court, that *Stone v. Powell* had not overruled *Noia*'s deliberate bypass test in the fourth amendment context, and, applying *Noia*, that defendant's failure to raise the claim with sufficient specificity was not a deliberate bypass. In the latter connection, the court noted,

> [N]othing in either [the *Francis* or *Williams*] decision purports to affect *Fay* in any way, although the dissenting opinions suggest a sub silentio modification of *Fay* . . . .
>
> . . . .
>
> . . . It would be inappropriate for us, as a lower court, to speculate about what *Francis v. Henderson* "really means" or about what the Supreme Court may do in the next case. Except as modified narrowly by *Francis* as to grand jury challenges, *Fay v. Noia* remains good law, and, as the Supreme Court has recently reminded us, "[o]ur institutional duty is to follow until changed the law as it now is . . . ."

Id. at 850-51 (citation omitted) (quoting in part Hudgens v. NLRB, 424 U.S. 507, 518 (1976)). On rehearing en banc, the majority affirmed the district court's dismissal of the writ, finding, on the basis of additional facts not presented to the original panel, *see* Gates v. Henderson, 568 F.2d 830, 840 (2d Cir. 1977) (Oakes, J., concurring), *cert. denied*, 98 S. Ct. 775 (1978), that defendant's objection in state court was based on fifth and sixth rather than fourth amendment grounds and that, in any event, *Stone v. Powell* overruled *Noia*'s deliberate bypass test as to fourth amendment claims. In addition, the majority on rehearing noted that *Noia* had "recently been severely limited even in the case of alleged violations of Fifth and Sixth Amendment rights where the constitutional violation reflects on the reliability of the evidence," and pointed out that *Wainwright v. Sykes*, decided by the Supreme Court two months earlier, related to the voluntariness of a confession. *Id.* at 838 n.6. Judge Oakes, who had written the majority opinion for the original panel, concurred in the result on the basis of the newly presented facts and the intervening Supreme Court decision in *Sykes*. He reiterated that, "[u]ntil the Supreme Court spoke more definitively, we as an inferior court were

trine was explicitly overruled, the Court would be unable to assure adherence to its views on the availability of habeas corpus in this context.

A. Background of the *Sykes* Case

Wainwright v. Sykes,[229] a case having none of the racial overtones of *Francis,* but possessing the virtue of a stipulation in which the state prisoner withdrew his claim of ineffective assistance of counsel,[230] became the Court's vehicle for dispatching *Noia*'s deliberate bypass test with respect to defaults occurring in the course of the trial and for reinstating a variant of the adequate state ground rule as a bar to federal habeas relief.

In January 1972, John Sykes was charged with second degree murder.[231] During the course of his trial six months later,[232] the prosecution introduced statements made by the defendant at the police station. Sykes had been given the appropriate *Miranda* warnings, but officers testified that at the time of his arrest Sykes had also been under the influence of alcohol.[233] Notwithstanding a Florida procedural rule authorizing pretrial motions to suppress and trial objections to the admissibility of illegal confessions,[234] Sykes' attorney, for reasons that remain unknown, took no action to prevent introduction of the foregoing statements,[235] and no evidentiary hearing was ever held on their admissibility.[236] Defendant's case consisted of evidence introduced to prove that the shooting was in self-defense.[237] The jury

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bound by *Fay v. Noia,* and thus the panel majority applied the deliberate bypass standard." *Id.* at 842.

229. 433 U.S. 72 (1977). The majority opinion was written by Justice Rehnquist. Chief Justice Burger and Justice Stevens wrote separate concurring opinions, but joined in the majority opinion. Justice White wrote an opinion concurring in the judgment. Justice Brennan wrote a dissenting opinion in which Justice Marshall joined.

230. *See id.* at 75 n.4.

231. Brief for Respondent at 4-5, Wainwright v. Sykes, 433 U.S. 72 (1977).

232. *Id.* at 5.

233. 433 U.S. at 74-75.

234. *Id.* at 76 n.5.

235. *See id.* at 75; *id.* at 104 (Brennan, J., dissenting).

236. *See* Wainwright v. Sykes, 528 F.2d 522, 524 (5th Cir. 1976), *rev'd,* 433 U.S. 72 (1977); Sykes v. Wainwright, No. 73-316 (M.D. Fla., Jan. 22, 1975), *aff'd,* 528 F.2d 522 (5th Cir. 1976), *rev'd,* 433 U.S. 72 (1977), *reprinted in* Appendix at 23, 24-25, Wainwright v. Sykes, 433 U.S. 72 (1977) [hereinafter cited as *Sykes* Appendix (federal district court opinion)]. Sykes contended that, under Florida law, if the accused failed to move to suppress a confession, the trial judge was nonetheless under an obligation to conduct a voluntariness hearing. The defendant thus viewed this state law as avoiding any possibility of a procedural default. Brief for Respondent at 11-14.

237. Brief for the United States as Amicus Curiae at 7-9, Wainwright v. Sykes, 433 U.S. 72 (1977).

found Sykes guilty of third degree murder, and he was sentenced to ten years in prison.[238] On direct appeal in the state courts, the defendant made no attack on the admissibility of his statements,[239] and the conviction was affirmed.[240] In subsequent state collateral proceedings, Sykes, for the first time, challenged the voluntariness of his admissions to the police. An intermediate Florida appellate court refused to consider this claim on the apparently erroneous ground that such a challenge had been decided adversely to the defendant on direct appeal.[241] The state's highest court thereafter denied Sykes' petition without a published opinion.[242]

Proceeding apace,[243] Sykes filed a federal habeas petition in April 1973, alleging that his statements at the police station were erroneously admitted at trial because there had been no *Jackson v. Denno* hearing[244] as to their voluntariness. Defendant asserted that, at the time he made these statements, he was intoxicated and therefore had no capacity to understand the *Miranda* warnings or to waive his rights.[245] Although the habeas case was set for an evidentiary hearing, Sykes rested on the basis of the state trial transcripts and other documents in the file, and neither side presented any witnesses.[246] At the same time, defendant withdrew a claim of ineffective assistance of counsel because the federal habeas judge advised that pressing this claim would require exhaustion of state court remedies.[247] The United States District Judge found that the state had not proved that defendant's failure to raise an objection to introduction of his statements was a deliberate, strategic decision and stayed federal proceedings for ninety days in order to allow the state to conduct a *Jackson v. Denno* hearing.[248] On an appeal by the warden, the Fifth

238. *Id.* at 9.

239. *See* 433 U.S. at 75.

240. Sykes v. State, 270 So. 2d 482 (Fla. Dist. Ct. App. 1972) (per curiam), *cert. denied*, 274 So. 2d 235 (Fla. 1973).

241. *See* Sykes v. State, 275 So. 2d 24 (Fla. Crim. Ct. App. 1973).

242. Brief for the United States as Amicus Curiae at 10.

243. Since Sykes' state court trial took place in June 1972, *see id.* at 4, and he instituted his federal habeas action in April 1973, *see id.* at 10, only ten months had elapsed, during which he expeditiously exhausted state direct and collateral remedies. Thus, this is not an instance in which the prisoner delayed in an effort to have the conviction set aside "at a time when reprosecution might well have been difficult." Davis v. United States, 411 U.S. 233, 241 (1973).

244. *See* note 39 *supra*.

245. Wainwright v. Sykes, 528 F.2d 522, 523 (5th Cir. 1976), *rev'd*, 433 U.S. 72 (1977). This contention was alluded to briefly in the Supreme Court opinion. *See* 433 U.S. at 74-75.

246. *Sykes* Appendix (federal district court opinion), *supra* note 236, at 24-25.

247. *See* 433 U.S. at 105 n.6 (Brennan, J., dissenting).

248. *See Sykes* Appendix (federal district court opinion), *supra* note 236, at 29-30.

Circuit affirmed, holding that the state must provide such a hearing prior to the admission of any confession, that its failure to do so precluded a finding of waiver on defendant's part, and that the absence of an objection by defendant could not be deemed a trial tactic or deliberate bypass because "no possible advantage" could have accrued to Sykes as a result of his procedural default.[249] The Fifth Circuit distinguished *Davis v. United States* on the ground that, unlike racially discriminatory grand jury selection processes, the admission of confessions was inherently prejudicial.[250]

B. The Supreme Court's Decision—"Cause" and "Prejudice" Requirements

The Supreme Court reversed. In an opinion by Justice Rehnquist, the Court decided that, with respect to procedural defaults committed by defendant or defense counsel in the course of a state trial, the "dicta of *Fay v. Noia*" had been limited by *Francis v. Henderson*.[251] The crucial question in the case was stated and an-

249. *See* Wainwright v. Sykes, 528 F.2d 522, 527 (5th Cir. 1976), *rev'd*, 433 U.S. 72 (1977).

250. *See id.* at 526-27.

251. 433 U.S. at 84-88. The Court added,

> We have no occasion today to consider the *Fay* [v. *Noia*] rule as applied to the facts there confronting the Court. Whether the *Francis* rule should preclude federal habeas review of claims not made in accordance with state procedure where the criminal defendant has surrendered, other than for reasons of tactical advantage, the right to have all of his claims of trial error considered by a state appellate court, we leave for another day.

Id. at 88 n.12. Thus, the Court appears to have limited *Noia*'s deliberate bypass rule to the appellate context and to have left open the question of its applicability even there.

For an opinion indicating that the lower federal courts may not be reluctant to extend *Sykes* to appellate contexts, see Ennis v. LeFevre, 560 F.2d 1072, 1075 (2d Cir. 1977) (Meskill, J.), in which defendant's assigned appellate attorney failed to secure the minutes of an identification suppression hearing or to brief or argue the issue on appeal. Defendant not only protested counsel's refusal to do so, but also attempted to have him replaced and filed a pro se supplemental brief on the identification issue. In the federal habeas action, the prisoner alleged that the state's failure to provide the minutes of the hearing constituted a denial of equal protection and that he had been denied effective assistance of counsel.

In affirming the district court's denial of the writ, the members of the Second Circuit panel wrote three separate opinions. Judge Meskill, relying on *Sykes*, determined that the lawyer's decision not to raise the identification issue on appeal was binding on the defendant and rendered the state's failure to provide the hearing minutes harmless error. Judge Meskill found it unnecessary to reach the ineffective assistance claim because the prisoner had not exhausted state remedies with respect thereto. *See id.* at 1076-77. Judge Gurfein concurred in the result on the ground that exhaustion was required with respect to the sixth amendment claim. He found it unnecessary, however, to reach the issue whether counsel could bind his client as to

swered: "Shall the rule of *Francis* v. *Henderson* . . . barring federal habeas review absent a showing of 'cause' and 'prejudice' attendant to a state procedural waiver, be applied to a waived objection to the admission of a confession at trial? We answer that question in the affirmative."[252]

Noting that *Noia* had painted with an unduly "broad brush,"[253] the majority declined to give any "precise definition" of the cause and prejudice requirements other than to observe that it was a stricter standard than that announced in *Noia*.[254] An inkling of the Court's perceptions in this regard was provided, however, in its one-paragraph explanation of the application of the new standard to Sykes. That paragraph in its entirety states,

> The "cause"-and-"prejudice" exception of the *Francis* rule will afford an adequate guarantee, we think, that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice. Whatever precise content may be given those terms by later cases, we feel confident in holding without further elaboration that they do not exist here. Respondent has advanced no explanation whatever for his failure to object at trial, and, as the proceeding unfolded, the trial judge is certainly not to be faulted for failing to question the admission of the confession himself. The other evidence of guilt presented at trial, moreover, was substantial to a degree that would negate any possibility of actual prejudice resulting to the respondent from the admission of his inculpatory statement.[255]

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posttrial decisions. *See id.* at 1077. Judge Newman, also concurring in the result, deemed exhaustion unnecessary. Although appellate counsel had apparently never read the transcript of the identification hearing, Judge Newman stated that he had reviewed these minutes and that he was "entirely satisfied that while a non-frivolous challenge could have been made, petitioner's appellate counsel cannot be faulted for considering the probability of success too slight to merit inclusion in the initial appeal." *Id.* at 1078. Judge Newman reasoned that appellate counsel "could have learned the substance of the identification procedures" from other sources. *Id.*

It should be noted that appellate counsel successfully raised one issue in state court, resulting in a considerable reduction in sentence; but the identification claim was apparently the only one that could have resulted in a reversal of the judgment of conviction. *See id.* at 1077-78.

252. 433 U.S. at 87. The question, as phrased, can of course only be answered in the affirmative because it refers to a "waived objection."

253. *Id.* at 88 n.12.

254. *See id.* at 87; *id.* at 99-100 (Brennan, J., dissenting) ("[T]he Court adopts the two-part 'cause'-and-'prejudice' test originally developed in [*Davis* and *Francis*]. As was true with these earlier cases, however, today's decision makes no effort to provide concrete guidance as to the content of those terms.") (citations and footnote omitted).

255. *Id.* at 90-91 (footnote omitted).

On the basis of this somewhat less than expansive interpretation and application of the new requirements, the Court reversed with instructions that the petition be dismissed.[256]

Both Justice Brennan's dissenting opinion and Justice White's concurrence in the judgment suggested that the actual prejudice test was similar to the harmless error doctrine.[257] The latter test requires the state to prove beyond a reasonable doubt that the constitutional violation did not contribute to defendant's conviction, so that where illegal evidence is merely cumulative and there is other overwhelming proof of guilt, the constitutional error is deemed harmless.[258] Although susceptible of this interpretation, the majority's discussion of actual prejudice, and specifically its use of the phrase "miscarriage of justice," suggests that the *Sykes* prejudice test is significantly less stringent than the harmless error doctrine.[259] In *Chapman v.*

256. *See id.* at 91. In contrast, the Court in *Francis* affirmed the decision of the Fifth Circuit remanding the case for a hearing on the issue of prejudice. *See* Francis v. Henderson, 425 U.S. 536, 542 (1976), *aff'g sub nom.* Newman v. Henderson, 496 F.2d 896 (5th Cir. 1974).

257. *See* 433 U.S. at 98 (White, J., concurring); *id.* at 117 (Brennan, J., dissenting). Justice White believed that the majority in effect found harmless error and that it was therefore unnecessary to discuss further modification of the deliberate bypass test in the context of contemporaneous objections. Since, however, the majority had proceeded to do so, he added his views with respect to the appropriate contents of the cause and prejudice requirements. *See* note 267 *infra.*

258. *See, e.g.,* Harrington v. California, 395 U.S. 250, 251 (1969); Chapman v. California, 386 U.S. 18, 24 (1967).

259. *See* 433 U.S. at 90-91. The opinion and the briefs in the case disclose the following evidence bearing on whether there was actual prejudice: the prosecution's case against Sykes consisted primarily of testimony by police officers who responded to a telephone call from defendant's wife. This call was made at the request of the accused. *See id.* at 74. Upon the arrival of the police at the scene, defendant's wife, who was hysterical, told the officers that her husband had shot the deceased. *See* Brief for the United States as Amicus Curiae at 4-5. Defendant also volunteered the same information. *See* 433 U.S. at 74. Thus, the issue was never whether Sykes had committed the shooting but whether he had done so in self-defense. *See* Brief for the United States as Amicus Curiae at 4. *But see* 433 U.S. at 93 n.2 (Burger, C.J., concurring) ("One is left to wonder what use there would have been to an objection to a confession corroborated by witnesses who heard Sykes freely admit the killing at the scene within minutes after the shooting."). The police officers testified that after they arrested the defendant they took him to the county jail and advised him of his *Miranda* rights. *See id.* at 74. They further testified that defendant thereafter initially made a false exculpatory statement—that the victim had accidentally shot himself—and then made an inculpatory statement. *See* Brief for the United States as Amicus Curiae at 5. The officers also stated that Sykes was under the influence of alcohol at the time of his arrest. *See* 433 U.S. at 74-75. On cross-examination, defense counsel elicited the information that both defendant and the deceased had been intoxicated at the time of the shooting. The prosecution presented evidence that the deceased was unarmed. Finally, although Sykes had a cut on his hand, which he later claimed was inflicted by the victim with a knife, a physician testified on behalf of the state that this wound was

California,[260] the decision announcing the harmless error rule, the Court reversed a state court determination that, in view of the considerable evidence against the accused, the trial judge's and prosecutor's comments on defendants' failure to testify did not result in a "miscarriage of justice" within the meaning of the state constitution.[261] Thus, the reference in *Sykes* to miscarriage of justice may be implicitly rejecting, at least for purposes of habeas review,

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not caused by a sharp blade. *See* Brief for the United States as Amicus Curiae at 6-7.

The defendant's case consisted of testimony by Sykes that he had been drinking during the day and that, while he was having dinner, the deceased, who was his friend and occasional employer, came to his home. According to the defendant, an altercation ensued when the victim accused Sykes of lying, picked up defendant's gun, and threatened to shoot the accused and his wife. Defendant further testified that he grabbed the gun, that the victim reached back to get a knife, and then ran out of the house; but the victim then turned around and came back toward the dwelling, shouting threats. Sykes stated that he believed his life to be in danger and shot the victim. At some point in his testimony Sykes asserted that the victim had attacked him with a knife and cut him. Defendant also testified that he had prior convictions for assault with a pistol and unlawful possession of a firearm, that he was employed at the time of the shooting, and that he had been out of trouble since his release from jail. Mrs. Sykes testified and corroborated some portions of her husband's testimony. She did not, however, hear the conversation that immediately preceded the shooting. Several other witnesses testified that the deceased had in the past carried weapons and threatened to use them. *See* Brief for the United States as Amicus Curiae at 7-9.

Based on its assessment of the foregoing testimony and of the record generally, *see* 433 U.S. at 91; *id.* at 97-98 (White, J., concurring), the *Sykes* majority determined that there was no actual prejudice. It is possible, however, to conclude otherwise. *See id.* at 117 (Brennan, J., dissenting) ("I disagree with the Court's appraisal of the harmlessness of the admission of respondent's confession . . . ."). It would appear that the jury believed part of Sykes' testimony or at least considered him less culpable than the state alleged since the jury found him guilty of murder in the third degree, FLA. STAT. § 782.04(4) (1973) (a killing "perpetrated without any design to effect death"), rather than murder in the second degree as charged, *id.* § 782.04(2) (a killing "by an act imminently dangerous to another and evincing a depraved mind regardless of human life"). Had the trial court excluded the false exculpatory statement and the inculpatory statement made by defendant after receipt of the *Miranda* warnings, it is conceivable that the jury would have reduced the charges still further or perhaps accepted Sykes' claim of self-defense, even if the out-of-court statements could have been used for impeachment purposes, *see* notes 276-78 *infra* and accompanying text.

Since the harmless error rule requires reversal unless the illegal evidence was harmless beyond a reasonable doubt, *see* text accompanying note 262 *infra*, and since it is difficult to ascertain how that standard was met in the instant case, it would appear that the majority was utilizing the miscarriage-of-justice standard to which it alluded and that such a standard is more difficult for a prisoner to overcome than the harmless error test.

260. 386 U.S. 18 (1967).

261. *See id.* at 20; *cf.* Irvin v. Dowd, 359 U.S. 394, 403 (1959), *discussed at* note 16 *supra* (state's highest court, in a capital case, was able to conclude that there was "no miscarriage of justice," notwithstanding inflamed community passions contaminating the jury itself) (citing Irvin v. State, 236 Ind. 384, 392-93, 139 N.E.2d 898, 902 (1957)).

Chapman's admonitions that evidence that "possibly influenced the jury adversely" is not harmless and that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[262]

The majority's only explanation of the cause requirement was a footnote citing and quoting *Henry v. Mississippi* and *Estelle v. Williams* for the proposition that defendants are bound by trial judgments of their attorneys.[263] Thus, defendant's personal participation is no longer a predicate for imposition of a forfeiture, and, in view of the Court's explicit rejection of the deliberate bypass standard with respect to trial errors, it is likewise clear that there need be no proof that counsel's default was either intentional or grounded in trial tactics. Indeed, as part of its discussion of the policy considerations underlying its rejection of *Noia,* the Court tacitly abandoned its efforts in *Francis* and *Williams* to determine whether, with respect to the particular type of constitutional claim, there could have conceivably been a strategic or tactical basis for the default in question.[264] In its place the Court in effect created a presumption that all defense attorneys who commit procedural defaults with respect to constitu-

262. Chapman v. California, 386 U.S. 18, 23-24 (1967); *cf.* LiPuma v. Commissioner, 560 F.2d 84 (2d Cir.), *cert. denied*, 98 S. Ct. 189 (1977). In *LiPuma*, the United States District Court had granted habeas relief on the grounds "that it could not conclude, 'beyond a reasonable doubt' that LiPuma's suppression motion would have failed had it been made in a timely fashion," and that "there was a clear 'reasonable possibility of prejudice to petitioner as a result of his counsel's glaring neglect.' " *Id.* at 92 (quoting in part the district court opinion). In its decision, rendered eighteen days after *Sykes*, the Second Circuit reversed, finding that, since the fourth amendment claim was not sufficiently supported, failure to make a motion based thereon did not constitute ineffective assistance, that the reasonable doubt standard was inappropriate for determination of the probable outcome of the suppression motion, and that "[t]raditionally, the burden of proof has been on the petitioner in a federal habeas corpus proceeding to prove, by a fair preponderance of the evidence, that his conviction must be vacated and his release ordered." *Id.* The court noted, however, that had the substantive issue of consent to the search been litigated, "the burden would have been on the State." *Id.* at 92 n.4.

263. *See* 433 U.S. at 91 n.14. *Henry* and *Williams* are of course inconsistent with one another, inasmuch as *Henry* requires that the default be tactically or strategically motivated, *see* 379 U.S. at 451-53, and *Williams* determined this factor to be irrelevant, *see* 425 U.S. at 512.

264. In *Francis*, the Court quoted *Davis* in support of the view that

> "[s]trong tactical considerations would militate in favor of delaying the raising of the claim [challenging the grand jury] in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult."

425 U.S. at 540 (quoting 411 U.S. at 241). Similarly, in *Williams* the Court noted the possibility that a defendant might wish to elicit jury sympathy by appearing at trial in his or her jail uniform. *See* 425 U.S. at 508.

tional issues may have done so for the purpose of "sandbagging," that is, trying to secure acquittal in the state courts and in the event of conviction proceeding to federal habeas court because "their initial gamble [did] not pay off."[265]

Thus, all that is known from the majority opinion is that a deliberate tactical maneuver will make a showing of cause impossible. It is unclear, however, whether proof of either recklessness, negligence, ignorance of the rule, or ineffective assistance on the part of defense counsel will suffice to establish cause.[266] Justice White suggested that mistakes of counsel based on professional judgment will not constitute cause, unless they amount to "plain error" or errors so blatant as to constitute ineffective assistance. He also believed that proof of defense counsel's ignorance of the particular procedural rule would meet the cause requirement.[267] By a process of elimination, it would appear that according to Justice White's analysis a showing of negligence on the part of the defense attorney would be insufficient to excuse the default.

In a separate concurring opinion, Justice Stevens took the position that, in view of the equitable nature of habeas relief, a totality-of-the-circumstances approach was preferable in assessing the effect to be given procedural defaults.[268] Since competence of defense counsel was one of the factors to be weighed,[269] Justice Stevens proceeded to determine whether there was a basis in the record for believing that the default in *Sykes* could be the result of a tactical decision by competent trial counsel. Hearkening back to the *Francis-Williams* approach of looking for a possible tactical motivation, he noted that

265. 433 U.S. at 89.

266. *See id.* at 100 (Brennan, J., dissenting) ("[L]eft unanswered is the thorny question that must be recognized to be central to a realistic rationalization of this area of law: How should the federal habeas court treat a state procedural default that is attributable purely and simply to the error or negligence of a defendant's trial counsel?").

267. *See id.* at 99 (White, J., concurring). Justice White stated that the burden of proving cause and of negativing deliberate bypass was on the accused, but he also observed that "[a]s long as there is acceptable cause for the defendant's not objecting to the evidence, there should not be shifted to him the burden of proving specific prejudice." *Id.* at 98.

268. *See id.* at 94 n.1, 94-96. Justice Stevens believed that the majority's holding was consistent with the manner in which the lower federal courts had been interpreting *Noia*. *See id.* at 94 n.1. He considered that, in any event, requiring the defendant's personal participation in the context of a contemporaneous objection was unrealistic. *But see* notes 283-304 *infra* and accompanying text. Conversely, Justice Stevens was of the view that even an express waiver by the defendant may not be sufficient to excuse a grave constitutional error. *See* 433 U.S. at 95.

269. The other factors included "the procedural context in which the asserted waiver occurred, the character of the constitutional right at stake, and the overall fairness of the entire proceeding." 433 U.S. at 96 (Stevens, J., concurring).

defendant's confession in many respects corroborated his trial testimony and that, to the extent it was inconsistent with such testimony, the confession could in any event have been utilized for impeachment.[270] Thus, Justice Stevens theorized that defense counsel may well have decided not to object to the introduction of material whose exclusion could at most have been only temporary.[271]

Since this analysis constitutes the only extensive effort by a member of the *Sykes* majority to apply the requirements for imposition of a forfeiture to the facts of the case, Justice Stevens' reasoning deserves careful consideration. Notwithstanding the superficial plausibility of his argument in this regard, there are compelling reasons why competent defense counsel would have been more likely to seek suppression of defendant's statements even if he or she thought that their admission would be more helpful than harmful or that the chances of suppression were negligible. First, had Sykes' attorney moved to suppress the statements prior to trial, the hearing on the motion would have afforded an opportunity to cross-examine key prosecution witnesses, which would in turn have permitted counsel to determine their strengths and deficiencies as witnesses, thus enabling counsel to select the best approach for cross-examination at trial on the case-in-chief. Second, a pretrial hearing would have given the defense attorney a possible impeachment tool had inconsistencies between the trial testimony and the hearing testimony developed. Third, the pretrial hearing would have permitted limited discovery with respect to a significant aspect of the state's case.[272]

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270. *See id.* Justice Stevens observed that

> [Sykes'] statement was consistent, in many respects, with the [defendant's] trial testimony. It even had some positive value, since it portrayed the [defendant] as having acted in response to provocation . . . . To the extent that it was damaging, the primary harm would have resulted from its effect in impeaching the trial testimony, but it would have been admissible for impeachment in any event . . . .

Id. (citation omitted).

271. *See id.* at 97. Justice Stevens concluded that, since the police had complied with *Miranda* and the proceeding was fundamentally fair, there was no basis for collateral attack. *See id.*

The majority left open the issue of "whether a bare allegation of a *Miranda* violation, without accompanying assertions going to the actual voluntariness or reliability of the confession, is a proper subject for consideration on federal habeas review, where there has been a full and fair opportunity to raise the argument in the state proceeding. See *Stone* v. *Powell* . . . ." *Id.* at 87 n.11 (citation omitted).

272. The hearing on a motion to suppress is an excellent disclosure tool. The scope of the exclusionary hearing is greater than that of the preliminary hearing and will permit an astute defense counsel to discover facts beyond the issues of the hearing and relating to the merits which he would not be able to obtain by other means.

F. BAILEY & H. ROTHBLATT, INVESTIGATION AND PREPARATION OF CRIMINAL CASES § 352

Moreover, even if part of defendant's admission or confession gave some support to a claim of provocation or self-defense,[273] its introduction by the prosecution as part of the state's case almost inevitably imprinted on the minds of the jurors the notion that the confession was incriminating since, otherwise, the prosecution would presumably not have used it.[274] Had defense counsel viewed the confession as unqualifiedly advantageous, the appropriate course, after having obtained an order of suppression, would have been to call the police officers who secured the statements as witnesses for the defense. Furthermore, had the prosecution been prohibited from introducing the confession, defense counsel might have decided not to call the defendant as a witness, given his prior convictions of assault with a pistol and of unlawful possession of a firearm. Instead, Sykes' claim of provocation or self-defense might have been established, at least in part, through the testimony of his wife, who witnessed some of the events and who did in fact testify on his behalf, and by the testimony of other witnesses that the victim had in the past both carried weapons and threatened others with their use.[275]

Alternatively, if defense counsel thought that as a practical matter Sykes had to testify notwithstanding his prior convictions, it is true that under *Harris v. New York*[276] the statements could probably have been used for impeachment.[277] The prejudicial effect of allowing

(1970); *see id.* at § 324 ("The motion to exclude or suppress illegally obtained evidence is crucial to the defense and often helps determine a case. When made before trial, the ensuing evidentiary hearing is a unique opportunity to gain a decided advantage over the prosecution . . . ."); *cf.* Coleman v. Alabama, 399 U.S. 1, 9 (1970) (preliminary hearing is a "critical stage" requiring assignment of counsel and an attorney is essential in order to "expose fatal weaknesses in the state's case . . . fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, . . . [and] discover the case the State has against his client.").

273. *See* Wainwright v. Sykes, 433 U.S. 72, 96 n.5 (1977) (Stevens, J., concurring).

274. *Cf.* Miranda v. Arizona, 384 U.S. 436, 477 (1966) ("[N]o distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.' If a statement made were in fact truly exculpatory, it would, of course, never be used by the prosecution.").

275. *See* note 259 *supra.*

276. 401 U.S. 222 (1971).

277. It is possible to distinguish *Harris* from the present case since Sykes' contention was that he was so intoxicated that he could not understand the *Miranda* warnings, and a knowing elicitation of a confession under such circumstances would render it involuntary. In *Harris* there was no claim of involuntariness. *See id.* at 224. An additional basis for distinction is that the *Harris* decision focused on prevention of perjury by defendants. In the case of one who is intoxicated at the time of the original statement, the contents of such a confession may be too unreliable to afford a basis for inferring that inconsistent trial testimony is perjurious.

In addition, although impeachment by a prior inconsistent statement can be extremely prejudicial to the defendant's case, and although such a statement may as

such impeachment on cross-examination could, however, have been mitigated by having the defendant himself explain, as part of his direct examination, any inconsistencies among his various statements to the police and between the latter and his trial testimony. Indeed, such explanations may have precluded prosecution use of the statements for impeachment purposes.[278] In any event, even if the district attorney was able on cross-examination to utilize the confessions to impugn defendant's explanations of the reasons for the inconsistencies, defense counsel would have undercut the prosecutor by assuring that his client rather than the state had brought out the confessions and the reasons for the inconsistencies.

The point is that after endless speculation it remains impossible to know why Sykes' trial attorney failed to object. Thus, the foregoing analysis demonstrates the pitfalls in utilizing Justice Stevens' conjectural basis for imputing strategic or tactical motives to attorneys who have committed procedural defaults with respect to constitutional claims. If there is no record disclosing the actual basis for defense counsel's inaction, appellate judges with the benefit of hindsight may conjure up reasons for the default in an utter vacuum—reasons that may not bear any relationship to trial realities or to the events that occurred in the particular case. Moreover, Justice Stevens' approach is one-sided since it takes into account only possible tactical benefits without considering the tactical disadvantages of the default. If courts were instead required to engage in a balancing of tactical benefits and detriments, they might well find that the disadvantages canceled or outweighed the advantages. Upon reaching a conclusion of this sort, appellate judges might feel some inhibition with respect to engaging in this practice at all or with respect to imputing counsel's defaults to the accused.

Furthermore, to buttress his conclusion that the default may have been intentional, Justice Stevens noted that, on the basis of his assessment of the trial testimony, Sykes' constitutional claim was "weak."[279] This conclusion amounts to a retrospective determination

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a practical matter be considered as substantive evidence by the jury, as a legal matter it is only to be considered by the jury in assessing the credibility of the accused. In a close case, that limitation may be of considerable value to the defendant.

278. The rationale of the *Harris* holding that statements obtained in violation of *Miranda* may be used for impeachment is prevention of perjury by the accused. *See id.* at 225-26. Since the defendant in the hypothetical situation described in the text would have made no perjurious statements, *Harris* would arguably be inapplicable, and the prior statements of the accused could not be used for impeachment.

279. Wainwright v. Sykes, 433 U.S. 72, 97 n.6 (1977) (Stevens, J., concurring). Justice Stevens reasoned that defendant's claim of intoxication was "not only implausible, but also somewhat inconsistent with any attempt to give credibility to his trial testimony, which necessarily required recollection of the circumstances surrounding

of the merits of the constitutional claim even though no hearing was ever held on this issue.

In sum, although Justice Stevens espouses a totality-of-the-circumstances approach, his analysis fails to take into account all of the relevant considerations for determining whether the default was deliberate. Moreover, by analyzing only the possible advantages accruing to the accused as a result of the default, he is able in effect to make an unsubstantiated inference that defense counsel was competent and to reach a conclusion based on hindsight that the unlitigated constitutional claim was probably without merit. Finally, such an ad hoc, totalities approach does not appear to afford a meaningful analytical framework for determining when or why federal habeas should be made available to state prisoners whose attorneys have committed procedural defaults.

C. The Policy Underpinnings of the *Sykes* Decision

Although the majority's discussion of the prejudice and cause requirements was limited, Justice Rehnquist did elaborate on the policies underlying substitution of these standards for the deliberate bypass test.[280] Justice Rehnquist began his policy discussion by describing the Florida procedural requirement as a "contemporaneous-objection rule" that "deserves greater respect than *Fay* [v. *Noia*] gives it."[281] The Court then pointed to numerous values enhanced as a result of contemporaneous trial objections. Such objections would, in the Court's view, permit constitutional determinations to be made when the memories of the parties were freshest, assure the existence of a state court record to guide the federal habeas judge in the event of subsequent proceedings, contribute to finality in state criminal litigation, prevent "sandbagging" by defense attorneys, and highlight the trial as the "main event" in the criminal justice process.[282]

The difficulties with these arguments begin in their major premise, for designating the procedure in question as a "contemporaneous-objection rule" is misleading. The decision whether to object to admission of a confession is not a split-second determination that counsel is required to make in the midst of trial by utilizing arcane

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the shooting." *Id.* It is possible, however, that Sykes could have been too intoxicated to understand the *Miranda* warnings in any meaningful sense, but at the same time able to recall the events surrounding his killing of another human being.

280. As pointed out in Justice Brennan's dissenting opinion, the issue presented was not whether federal habeas courts possessed power to entertain actions notwithstanding state court procedural defaults, but rather in which circumstances such power should be exercised. He noted that Congress could, by amendment of 28 U.S.C. § 2254 (1970), effectively overrule the *Sykes* decision. *See* 433 U.S. at 100 n.2.

281. 433 U.S. at 88.

282. *See id.* at 88-90.

knowledge possessed only by members of the legal profession. The Florida statute is typical of state criminal procedure rules that require motions to suppress confessions to be made *prior* to trial and permit the delaying of such objections until the trial only in exceptional circumstances.[283] Therefore, the decision is one concerning which the attorney has ample opportunity to consult with his or her client.[284]

Labeling the Florida procedure as a "contemporaneous-objection rule" is both a reflection of the majority's authoritarian view of the attorney-client relationship and a means of rendering unnecessary an analysis of the client's interest in personal participation in the relinquishment of a constitutional right. The determination whether to forgo a constitutional defense has tremendous personal implications for the defendant. A failure to discuss such a decision with the accused is virtually inexplicable and of doubtful propriety.[285] If on the basis of trial strategy counsel deems it preferable not to pursue the constitutional claim, this is surely a matter requiring the client's understanding and concurrence.[286] Moreover, if consultation and

283. *See, e.g.*, CAL. PENAL CODE § 1538.5 (b), (f)-(h) (West Supp. 1977); ILL. ANN. STAT. ch. 38, §§ 114-11, -12 (Smith-Hurd 1977); N.Y. CRIM. PROC. LAW § 710.40 (McKinney 1971 & Supp. 1977); PA. R. CRIM. P. 323.

284. Well before the trial, defense counsel is under an obligation promptly to interview his or her client, ascertain from the latter what statements, if any, he or she made to the police, conduct discovery to secure any such statements, engage in legal research to determine their admissibility, and discuss fully with the client the advisability of a motion to suppress. *See* AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE DEFENSE FUNCTION §§ 3.2(a), .8, 4.1, 5.1(a), .2(b) (Approved Draft 1971) [hereinafter cited as ABA DEFENSE FUNCTION STANDARDS]. Indeed, the attorney should promptly "take all necessary action to vindicate" the client's rights and "should consider all procedural steps which in good faith may be taken, including . . . moving to suppress illegally obtained evidence." *Id.* § 3.6(a).

285. *See id.* §§ 3.8, 5.2(b).

286. *See id.* § 5.2 (emphasis added):

> (a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are: (i) what plea to enter; (ii) whether to waive jury trial; (iii) whether to testify in his own behalf.
>
> (b) The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer *after consultation with his client.*
>
> (c) If a disagreement on significant matters of tactics or strategy arises between the lawyer and his client, the lawyer should make a record of the circumstances, his advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relation.

agreement take place,[287] there is no need to eliminate the deliberate bypass rule.[288] On the other hand, if counsel's failure to discuss the issue with defendant stems from the attorney's ignorance or negligence with respect to the constitutional claim or with respect to the appropriate procedure for asserting the claim, imposition of a forfeiture is wholly at odds with the Court's suggestion that the deliberate bypass rule should be rejected because it encourages "sandbagging" by defense counsel.

The notion that was implicit in the majority opinion[289] was explicitly stated in the Chief Justice's concurrence:

> Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate—and ultimate—responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Not only do these decisions rest with the attorney, but such decisions must, as a practical matter, be made without consulting the client.[290]

With few exceptions,[291] this description of the "realities" of effective litigation of criminal cases appears to be inaccurate. Basic decisions concerning trial strategy, witnesses to be called, and defenses, constitutional or otherwise, should be made before trial after complete consultation and information sharing between attorney and client.[292] The "on-the-spot" trial decisions that concern the Court should, for the most part, be carefully considered and decided long before the moment of truth.[293] Indeed, if the Chief Justice's concern is that

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287. Although section 5.2 of the ABA Defense Function Standards makes such tactical decisions "the exclusive province of the lawyer after consultation with the client," if the latter strongly disagrees, counsel should consider whether he or she is obliged to withdraw from the case. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(C)(1)(d).

288. This assumes that the decision not to object is based on strategic or tactical considerations and that the advice given by counsel is within the range of competence required of criminal defense attorneys. If not, the issue of ineffective assistance of counsel is presented.

289. *See* Wainwright v. Sykes, 433 U.S. 72, 91 n.14 (1977).

290. *Id.* at 93 (Burger, C.J., concurring) (footnote omitted). Section 5.2(b) of the ABA Defense Function Standards, on which the Chief Justice relies, generally supports his position, with the conspicuous exception that it requires that decisions of the sort he mentions be made "after consultation" with the client. *See* note 286 *supra.*

291. Careful preparation will eliminate the possibility of surprise in many instances. But, for example, where the prosecution offers unanticipated hearsay testimony implicating the sixth amendment confrontation and cross-examination rights, counsel will not have sufficient time to consult with the accused.

292. *See* Tigar, *supra* note 119, at 23-24, 27. *See generally* F. BAILEY & H. ROTHBLATT, *supra* note 272, §§ 3, 13, 31, 38, 133, 144, 149; I. MENDELSON, DEFENDING CRIMINAL CASES 51-53 (rev. ed. 1967).

293. *See generally* Wright & Sofaer, *supra* note 15, at 895, 972-75. To be sure,

defendants not interfere with decisions made on their behalf by counsel, it is unclear why he concedes that determinations whether to waive a jury trial or to testify are decisions "ultimately for the accused to make"[294] since both decisions are integral to an attorney's formulation of trial strategy. It is likewise unclear why these decisions are to be considered different in kind from the determination whether to seek suppression of a confession. Furthermore, if the basic decision to testify is one that the client must ultimately make, it should presumably be an informed decision considered in the context of the other "myriad tactical decisions"[295] that should also be made before trial and after consultation between the accused and his or her attorney.

This paternalistic view of the attorney-client relationship offers a rather disturbing glimpse of the majority's view of defendants in criminal cases. There is an underlying assumption that such defendants are incapable of making intelligent decisions concerning matters deeply affecting their lives—a view that not all members of the Court espouse when deciding that a confession has been knowingly and intelligently made to police officers by a defendant who fully comprehended his or her *Miranda* rights.[296]

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criminal trials, conducted for the most part without the benefit of liberal pretrial discovery as in civil cases, offer the potential for uncertainty and unanticipated evidence. To the extent that such unexpected events occur and may necessitate a major change in defense strategy, a recess could be requested to discuss the matter with defendant. If a recess is not possible or such surprises are less momentous, the attorney will necessarily be required to take action without consulting his or her client. In the latter circumstances, the fairness of imputing counsel's procedural default to the accused should be considered.

294. Wainwright v. Sykes, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring). Chief Justice Burger was relying on section 5.2 of the ABA Defense Function Standards in excepting these decisions from counsel's ultimate control. The text of section 5.2 appears at note 286 *supra.*

295. 433 U.S. at 93 (Burger, C.J., concurring). The decision by the defendant to testify cannot be made in a vacuum. If the accused is unaware of the overall trial strategy, his or her uninformed determination to testify or not to do so can effectively destroy a successful defense of the case.

296. *See* Brewer v. Williams, 430 U.S. 387, 417-20 (1977) (Burger, C.J., dissenting). In this 5-4 decision, the majority held inadmissible a confession made by an escapee from a mental hospital. Defense counsel had made arrangements for the defendant to surrender himself; after arraignment, counsel was refused permission to travel with defendant when he was being transported from one city to another. The defense attorney explicitly told the police not to question the accused during this trip, and the police promised not to do so as part of the original agreement to effect defendant's surrender. Nonetheless, a confession and the fruits thereof (the dead body of a ten-year-old girl) were elicited during the journey. In his dissent, the Chief Justice stated, *inter alia,*

> [C]onstitutional rights are *personal,* and an otherwise valid waiver should not be brushed aside by judges simply because an attorney was not present.

What amounts to a denigration of human dignity and ability to make intelligent choices has been successfully obfuscated by the Court's emphasis on the lawyer's mystique. Only the attorney is deemed capable of making critical litigation decisions. Such a broad assumption warrants more careful scrutiny.

The same sort of exalted estimation of oneself and one's profession is not confined to attorneys. An identical issue is raised in medical malpractice suits based on the alleged lack of informed consent. Physicians defend their failure to apprise patients of particular risks on the basis of the nonprofessional's inability to understand such esoterica.[297] Communication of the risks would also allegedly frighten patients, resulting in their refusal to undergo what the doctor considers to be necessary medical treatment.[298] Physicians therefore urge that the duty to disclose risks be determined by the prevailing customs of physicians in the community. Although a majority of jurisdictions still accept this standard,[299] a substantial minority have rejected it, one court articulating the following reasons:

> [I]t is the prerogative of the patient, not the physician, to determine for himself the direction in which his interests seem to lie. To enable the patient to chart his course understandably, some familiarity with the therapeutic alternatives and their hazards becomes essential.
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> . . . .
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> . . . The discussion need not be a disquisition, and surely the physician is not compelled to give his patient a short medical education; the disclosure rule summons the physician only to a reasonable explanation. . . .
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> . . . .
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> There are . . . formidable obstacles to acceptance of the notion that the physician's obligation to disclose is either germinated or limited by medical practice. . . . [T]o bind the disclosure obligation to medical usage is to arrogate the decision on revelation to the physician alone.[300]

> The Court's holding . . . denigrates an individual to a nonperson whose free will has become hostage to a lawyer so that until a lawyer consents, the suspect is deprived of any legal right or power to decide for himself that he wishes to make a disclosure. It denies that the rights to counsel and silence are personal, nondelegable, and subject to a waiver only by that individual.

Id. at 419. *See generally* Beckwith v. United States, 425 U.S. 341 (1976); Michigan v. Mosley, 423 U.S. 96 (1975).

297. *See* Canterbury v. Spence, 464 F.2d 772, 782 n.27 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

298. *See id.* at 778; Cobbs v. Grant, 8 Cal. 3d 229, 241-42, 502 P.2d 1, 9, 104 Cal. Rptr. 505, 513 (1972).

299. *See* Riskin, *Informed Consent: Looking for the Action*, 1975 U. ILL. L.F. 580, 582, 587.

300. Canterbury v. Spence, 464 F.2d 772, 781, 782 n.27, 783-84 (D.C. Cir.), *cert.*

The same court noted, however, that the above test related only to risk disclosures and did not affect determinations with respect to the physician's performance of professional duties, which continued to be governed by "prevailing medical practice" in the community.[301]

Similarly, in the case of lawyers, although professional performance may be tested by prevailing standards in the legal community,[302] there should be a duty to disclose all material information and to give advice concerning the waiver of a constitutional claim.[303] Indeed, there may be a greater need for disclosure on the part of attorneys than there is in the case of physicians since the lawyer must have the ongoing and informed cooperation of his or her client throughout the course of litigation.[304]

Aside from the Court's characterization of the Florida procedure as a "contemporaneous-objection rule" and its conceptual construct of the attorney-client relationship, other facets of the majority's policy analysis in *Sykes* are at the least problematic. It is true that, as Justice Rehnquist claimed, a contemporaneous objection will enable the state trial judge who observes demeanor to hold a hearing on the constitutional claim when witnesses' memories are freshest, that the resulting record will be accorded great weight in any subsequent federal habeas proceeding, and that finality in criminal proceedings will thus be a more distinct possibility.[305] Moreover, the state clearly has a legitimate interest in attaining such goals. These considerations do not, however, dispose of the issue that was before the Court: what penalties should be exacted from a defendant whose lawyer, because of negligence or ignorance, did not make a proper objection?[306]

It is not at all clear that such considerations are inconsistent with protecting the defendant from the effects of such negligence. For example, one means of assuring that objections are made at trial is to require the judge to ask defendant and his or her attorney whether they are waiving the right to press a constitutional claim. Indeed, the majority rejected what could have been a fairly simple solution to the problem of default in this case by refusing to accept Sykes' contention that *Jackson v. Denno* required a hearing on the voluntariness of a

denied, 409 U.S. 1064 (1972) (footnotes omitted).

301. *Id.* at 784-85.

302. *But see* text following note 394 *infra*.

303. *Cf.* D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 56 (1972) (study of a sample of personal injury claims in New York City indicates "a significant, positive statistical relationship between client participation and good case result").

304. Obviously, there are medical contexts in which cooperation by the patient at all times is imperative, but there are also many medical procedures, such as those performed after administration of a general anesthetic, during which the patient is only passively involved.

305. *See* Wainwright v. Sykes, 433 U.S. 72, 88-89 (1977).

306. *See id.* at 100 (Brennan, J., dissenting).

confession even in the absence of a request from defense counsel.[307]

By rejecting such an interpretation of *Jackson v. Denno*, the majority in effect abandoned the *Johnson v. Zerbst* standard for procedural defaults in the assertion of constitutional claims by counseled defendants, at least with respect to the challenging of confessions. If the judge is not required to advise a defendant that he or she has a right to a suppression hearing, which is the constitutionally mandated procedural mechanism for vindicating an involuntary confession claim, that right can be abandoned unknowingly and unintelligently. Thus, in the same way that dilution of the waiver standard in *Estelle v. Williams* perhaps necessitated a dilution of the deliberate bypass standard,[308] the elimination of deliberate bypass and substitution of a concept of procedural default by inaction in *Sykes* create the possibility of, or perhaps necessitate, findings of in-court waivers of substantive rights by inaction.[309]

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307. *See id.* at 86.

308. *See* notes 222-25 *supra* and accompanying text.

309. There were three "waivers" in the *Sykes* case: (1) The waiver of defendant's right against self-incrimination by making an out-of-court statement to the police; the standard for waiver of this federal substantive right is the *Johnson v. Zerbst* test as formulated in Miranda v. Arizona, 384 U.S. 436 (1966)—the intentional relinquishment of a known right. Theoretically, the *Sykes* decision does not affect this waiver standard. (2) The waiver of defendant's federal right to challenge the voluntariness of the foregoing out-of-court statement through a hearing, as required by Jackson v. Denno, 378 U.S. 368 (1964); this waiver by Sykes was an in-court waiver of the constitutionally prescribed means of testing the validity of his out-of-court waiver. The holding in *Sykes* makes the standard for this in-court waiver inaction rather than a knowing relinquishment. (3) The "waiver" of defendant's state remedies as a result of his failure to comply with the state rules establishing how and when the federally mandated hearing for determination of the voluntariness of a confession would be held. The Supreme Court ruled that this default by inaction barred Sykes from asserting his *Jackson v. Denno* right to a hearing challenging the voluntariness of his confession in a federal habeas proceeding, absent showings of cause and prejudice. Accordingly, here, too, *Sykes* makes the governing standard "waiver" (default) by inaction rather than knowing and intentional relinquishment (deliberate bypass). Thus, what emerges from *Sykes* is a symmetry between waivers of the sort involved in situation 2 and procedural defaults of the sort involved in situation 3. In fact, it may be impossible to have different standards for in-court waivers and for procedural defaults under state law barring federal habeas relief.

For example, if the standard for in-court waiver of a substantive constitutional right such as trial by jury is knowing relinquishment, *see* Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942), a federal habeas court could not use the *Sykes* test of procedural default by omission. If, however, a habeas court did apply *Sykes* to such a procedural default, it would in effect be changing the test for in-court waiver of the right to trial by jury. Thus, assume that a state procedural rule required defendants represented by counsel to request a trial by jury within ten days after indictment and further provided that failure to make such a request (an in-court waiver) resulted in the forfeiture of that right. If a defendant's attorney did not make a proper request because of ignorance of the rule, negligence, or inadvertence, and if the state

It is unclear why the state trial judge was given no responsibility to assure that the constitutional claim was in fact being waived.[310] A mere inquiry by the trial court as to whether the confession claim is being waived places no great burden on the judge, nor does it interfere with defense counsel's trial strategy. Moreover, the result would be a record disclosing that defendant and counsel were aware of the claim and presumptively waived it. Indeed, this is precisely the direction in which the Court is moving in guilty plea cases by requiring the trial judge to ascertain on the record the waiver of constitutional rights, as well as, at least in some cases, defendant's awareness of the elements of the crime.[311] The reason therefor is to create a record that

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imposed a forfeiture on that basis, the federal habeas court would be confronted with the issue of the appropriate standard to utilize in determining what effect should be given to the state procedural default. If the habeas court decided that defendant's state procedural default was governed by *Sykes,* then federal habeas relief would be barred (absent showings of cause and prejudice), and, of necessity, the *Johnson v. Zerbst* standard for in-court waiver of jury trials would be inapplicable. Conversely, if the federal court found that *Johnson v. Zerbst* must be given effect, it could only do so by applying *Noia's* deliberate bypass test rather than *Sykes,* and the state procedural default rule would have no effect on the availability of federal habeas review.

If, as Chief Justice Burger stated in his concurring opinion in *Sykes,* waiver of the right to trial by jury is a personal right of the accused that only he or she can waive, *see* 433 U.S. at 93 n.1, then in this context the *Johnson v. Zerbst* standard should prevail, and not the *Sykes* test. Since, however, the hypothetical state rule governing waivers of jury trials is similar to the Florida rule for waiver of the constitutionally mandated mechanism for vindicating fifth amendment rights, it is unclear why *Sykes* should apply in one case and *Johnson v. Zerbst* in the other.

Similarly, if the Court found the hypothetical jury trial waiver rule unconstitutional on the ground that it violated the federal law of waiver with respect to sixth amendment rights, under what rationale would the Florida procedural rule involved in *Sykes* escape constitutional invalidation? Neither rule is irrational since both establish orderly procedures for assertion of federal constitutional rights and both apply to counseled defendants. If the Court gave greater deference to the right to jury trial, the result would be an establishment of a hierarchy of rights in which jury trial, whose absence does not affect the reliability of the fact-finding procedure, is given priority over *Jackson v. Denno* rights, which do. *Compare* McKeiver v. Pennsylvania, 403 U.S. 528 (1971), *with* Jackson v. Denno, 378 U.S. 368 (1964).

310. *Cf.* Schneckloth v. Bustamonte, 412 U.S. 218, 243-44 (1973) *(Johnson v. Zerbst* standard should not be applied to a noncustodial consent search by the police: "To be true to *Johnson* and its progeny, there must be examination into the knowing and understanding nature of the waiver, an examination that was designed for a trial judge in the structured atmosphere of a courtroom.").

311. *See, e.g.,* Henderson v. Morgan, 426 U.S. 637 (1976); Boykin v. Alabama, 395 U.S. 238 (1969). In *Morgan,* the Court observed,

> Normally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit. This

is, in large part, invulnerable to collateral attack.

There is, of course, good reason for requiring this sort of record in the guilty plea context since the accused waives almost all rights. A defendant's decision, instead, to proceed to trial should not, however, be viewed as disclosing defendant's intention to leave to counsel all questions concerning whether any constitutional rights should be asserted. Nor should the election to go to trial militate in favor of a hands-off policy on the part of the state trial judge in advising defendant of constitutional rights. The only apparent result of not requiring the trial judge to advise defendant of constitutional claims and, at the same time, imposing virtually absolute forfeitures in the event of a failure to object is to place a penalty on defendants who refuse to plead guilty and instead proceed to trial.

From the foregoing, the following observations can be made. First, based upon a conception of the attorney-client relationship that is of doubtful validity, the Court has chosen to force the defendant to bear the full weight of his or her attorney's negligence. Second, such an imposition was wholly unnecessary, for the Court had available, indeed explicitly rejected, an alternative solution that would protect the defendant and achieve the legitimate interests of the state, without unduly burdening the courts. In addition, it appears that the specific evils upon which the Court justified its limitations on the availability of federal habeas were largely irrelevant to the question of whether the defendant should be penalized because of the failing of his or her attorney.

One such policy ground is Justice Rehnquist's assertion that an early objection "may force the prosecution to take a hard look at its hole card";[312] that is, the prosecutor might decide against using the contested evidence out of fear of subsequent reversal. Aside from the obvious unfairness of imposing a penalty upon the defendant as a means of forcing the prosecutor to evaluate the admissibility of the state's evidence, the technique is singularly ill-suited to its ends. The district attorney has a threshold obligation to assure that he or she is not using constitutionally impermissible evidence.[313] Every confession case raises a possible issue of involuntariness.[314] Therefore, prior

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case is unique because the trial judge found as a fact that the element of intent was not explained to respondent.

426 U.S. at 647.

312. Wainwright v. Sykes, 433 U.S. 72, 89 (1977).

313. *See* AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION § 5.6(b) (Approved Draft 1971) [hereinafter cited as ABA PROSECUTION FUNCTION STANDARDS].

314. *Cf.* Henry v. Williams, 299 F. Supp. 36, 41 (N.D. Miss. 1969) ("The District Attorney knew that . . . [the police officer's] testimony as to what he found without search warrant in the car during . . . [defendant's] absence was 'probably inadmissi-

to trial the prosecutor will, at least in theory, already have made a determination that the confession meets all constitutional requirements.[315] If the district attorney decides that the confession was constitutionally obtained, there is every reason to assume that the trial judge will allow its admission in evidence. Most issues relating to the voluntariness of confessions turn on the resolution of factual disputes and therefore involve determinations of credibility by the trial judge. Thus, unless the court uses an erroneous constitutional standard or its determination is clearly not supported by the record,[316] the district attorney knows quite well that the possibility of reversal of a voluntariness finding by a state appellate court or federal habeas judge is minuscule. Thus, the prosecution's decision to take a "hard look at its hole card" is, for the most part, unrelated to the contemporaneous objection by defense counsel.

The majority's concern with "sandbagging" by defense counsel represents another policy consideration that affords no basis for the imposition of a forfeiture on the accused. As Justice Brennan noted, the defendant has much to gain and nothing to lose by tendering an objection in accordance with state law.[317] By doing so, the accused increases the possibility of acquittal at the trial level or reversal on appeal in the state courts and, at the same time, assures the preservation of federal habeas remedies. By opting instead to "sandbag," defendant increases the possibility of conviction by allowing the allegedly unconstitutional evidence to be admitted, forfeits all state remedies with respect to the constitutional claim in the absence of "plain error," precludes direct Supreme Court review because of the adequate state ground rule, and also forfeits federal habeas relief if there is a finding of deliberate bypass.[318]

In any event, the sandbagging rationale is inapplicable to attorneys who commit defaults as a result of negligence or ignorance. These lawyers cannot possibly be deterred by the imposition of a

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ble' on Fourth Amendment grounds . . . . To the prosecution's surprise, when answers respecting the search were elicited, there was no immediate defense objection.").

315. Alternatively, if the prosecutor is uncertain with respect to the admissibility of the confession, he or she will have made plans based on the contingency that such evidence will be suppressed.

316. *See* Townsend v. Sain, 372 U.S. 293 (1963).

317. *See* Wainwright v. Sykes, 433 U.S. 72, 103 n.5 (1977) (Brennan, J., dissenting).

318. The only conceivable benefit derived from not asserting a constitutional objection in state court is the hope that an evidentiary hearing thereon will later be conducted by a federal habeas court that may be more sympathetic to the claim than the state court would be. The risks involved, however, in thus circumventing state court determinations of questions of fact and credibility (namely, possible forfeiture of all direct state and federal remedies) are so great that no rational attorney would advise taking such a course of action. *See* Reitz, *supra* note 15, at 1369-70.

forfeiture against their clients. On the other hand, if the default is intentional, proper application of the deliberate bypass concept would preclude federal habeas relief in the case of the true sandbagger.[319]

Justice Rehnquist also evinced a concern that *Noia* operated to force state courts to resolve constitutional claims on the merits notwithstanding defendant's failure to comply with state procedural rules.[320] Such compulsion would, in the Court's view, stem from a desire to avoid the possibility that the federal court would decide the constitutional question without an initial determination thereof by the state tribunal. To the extent that the majority was suggesting that *Noia* creates a Hobson's choice for the state court, the election imposed upon the latter is clearly less painful and the consequences clearly less onerous than the everyday strategic and tactical decisions that defendants and their attorneys must necessarily make in the course of criminal litigation.[321] In fact, most defendants will elect to utilize state procedures, and the state will not be forced to make this grisly choice. Those who engage in tactical maneuvers in circumvention of state procedural rules will, as the state court knows, be barred from securing federal habeas relief under the deliberate bypass rule. What is left is a residuum of ignorant or negligent defaulters. With respect to that category of defendants, the state should be encouraged to decide constitutional claims on the merits.[322] If the state court nonetheless decides that its procedural rules are paramount, it has a perfect right to do so and to impose a forfeiture of state remedies in this context.[323] In a federal system, however, the right of a defendant

319. Proper application of the deliberate bypass rule would require findings that the accused agreed to sandbag and that the attorney's advice to do so, resulting in an absolute forfeiture, was "within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, 397 U.S. 759, 771 (1970).

320. *See* Wainwright v. Sykes, 433 U.S. 72, 89-90 (1977). *But see* Reitz, *supra* note 15, at 1352:

> On the level of sound policy, one very desirable goal is to define the federal habeas corpus jurisdiction so as to serve as an incentive for improvement of state procedures. Improvement should mean, primarily, an increase in the number of cases which are heard and determined in the state courts on the merits of the controversy rather than on procedural issues. It would obviously reduce frictions if the state courts met and fairly decided the federal questions arising out of the administration of their criminal laws because there would be less need and fewer occasions to call upon the federal courts to vindicate federal rights in this area.

321. *See, e.g.*, United States v. Dinitz, 424 U.S. 600 (1976); Brady v. United States, 397 U.S. 742, 751-53 (1970); McMann v. Richardson, 397 U.S. 759, 769-70 (1970).

322. *See* note 320 *supra.*

323. An argument could be advanced, however, that imposition of a forfeiture of state remedies on this class of defendants violates due process or equal protection.

to assert in a federal forum a constitutional claim that he or she has unintentionally failed to assert in state court should outweigh the state's value choice in favor of rigid adherence to its procedural rules.

As a final policy argument, Justice Rehnquist observed that the availability of federal habeas despite a procedural default would tend to "detract from the perception of the trial of a criminal case in state court as a decisive and portentous event."[324] This is simply another facet of the finality obsession. As pointed out by Justice Brennan, our judicial system does not view finality as the ultimate virtue.[325] The harshness of the Court's demand in the case of a defendant whose attorney has mistakenly defaulted seems almost medieval. Moreover, no matter how liberal the rules for direct and collateral review are, the trial will always remain the "main event," simply by virtue of the fact that acquittal at that point is the single most important goal of the defendant in every criminal case. Indeed, even if the defendant expects to be and is convicted, the trial is no less "portentous"; the judgment of conviction carries with it a presumptive validity that haunts the prisoner throughout all stages of subsequent appellate and collateral review.

If, however, the Court truly believes that it is of transcendent importance that the trial be made the focal point of criminal litigation, the same logic would also restrict access to federal habeas in the case of defendants whose lawyers have not committed defaults in state court. Although the majority claimed that its decision did not change the law with respect to the availability of federal habeas to nondefaulting defendants,[326] many of the policy arguments in *Sykes* are equally applicable in that context. *Sykes* may therefore be a portent of further evisceration of the power granted to federal courts by 28 U.S.C. § 2254 to resolve constitutional claims of state prisoners.

In sum, none of the values served by the so-called contempora-

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Although the state is not constitutionally required to provide appellate or collateral remedies, *see* Case v. Nebraska, 381 U.S. 336 (1965); Griffin v. Illinois, 351 U.S. 12 (1956), once having done so, it may arguably not deny such remedies on irrational grounds, such as defendant's bad fortune in having retained or having been assigned an ignorant, negligent, or blundering attorney.

324. Wainwright v. Sykes, 433 U.S. 72, 90 (1977).

325. *See id.* at 115 (Brennan, J., dissenting):

> [I]t should be plain that in the real world, the interest in finality is repeatedly compromised in numerous ways that arise with far greater frequency than do procedural defaults. The federal criminal system, to take one example, expressly disapproves of interlocutory review in the generality of cases even though such a policy would foster finality by permitting the authoritative resolution of all legal and constitutional issues prior to the convening of the "main event."

326. *See id.* at 78-81.

neous objection rule, including the importance of finality in criminal litigation, justifies the harsh forfeiture rule promulgated in the *Sykes* case.[327]

III. AFTER *SYKES:* OF LOST HORIZONS, INEPT ATTORNEYS, AND IRATE PRISONERS

A. THE ROAD NOT TAKEN[328]

The decision in *Wainwright v. Sykes* came, after all, as no surprise. The almost ineluctable momentum of the case law traced in Part I of this Article virtually assured either continuation for some time of the covert case-by-case maiming process typified by *Francis v. Henderson* and *Estelle v. Williams* until, by a process of elimination, the deliberate bypass rule of *Fay v. Noia* had been gutted or a more expedited process of evisceration through announcement of a rule limiting the deliberate bypass doctrine to appellate and other, narrowly circumscribed, nontrial decisions. The *Sykes* majority chose the second alternative and indeed went a step further, confining deliberate bypass to the appellate context and leaving in doubt its viability even there.

As the decisions during the interim between *Noia* and *Sykes* reveal, the Supreme Court, even during the Warren era, was never altogether comfortable with the deliberate bypass test. Yet, substitution of the rigid forfeiture rule established in *Sykes* hardly seems a felicitous alternative. It would have been far preferable, from the standpoint of assuring both an even-handed federalism and an appropriate mechanism for vindication of the federal constitutional

327. Ultimately, all of these limitations on the finality of criminal convictions emerge from the tension between justice and efficiency in a judicial system that hopes to remain true to its principles and ideals. Reasonable people may disagree on how best to resolve these tensions. But the solution that today's decision risks embracing seems to me the most unfair of all: the denial of any judicial consideration of the constitutional claims of a criminal defendant because of errors made by his attorney which lie outside the power of the habeas petitioner to prevent or deter and for which, under no view of morality or ethics, can he be held responsible.

Id. at 115-16 (Brennan, J., dissenting).

328. I am aware that the proposal outlined in this section may be regarded as quixotic, if for no other reason than that it would never be accepted by the present Supreme Court majority. In this connection, I am reminded of an aside by Professor Edmond Cahn in a jurisprudence course I took from him in the spring of 1964. He observed that when Justices Murphy and Rutledge died in 1949 civil libertarians despaired concerning the Court's future; he noted, however, that, looking at the composition of the Court in 1964 and the decisions it was rendering, such despair had been shortlived. The message was clear: the law is not static, and changes and development will occur, if not now, ultimately. *See* CAHN, *A New Kind of Society,* in THE GREAT RIGHTS 9-12 (E. Cahn ed. 1963).

claims of defendants in criminal cases, simply to abolish the deliberate bypass limitation and to allow unlimited access to federal habeas courts by all prisoners who had exhausted state remedies.

At the outset, it should be recognized that the deliberate bypass rule was neither statutorily nor constitutionally mandated. It was a narrowly circumscribed, discretionary doctrine created by the Court as a response to concerns of equity, federalism, and comity.[329] Indeed, because the state procedural default already resulted in a total forfeiture of the right to assert federal constitutional claims in state court and in the Supreme Court on direct review, there was good reason not to impose a further hurdle, no matter how low, to assertion of the claim in federal habeas court. A federal court finding of deliberate bypass has a double-or-nothing effect; the defendant who has asserted and litigated all conceivable constitutional claims in state court is entitled to present them anew in federal court and to receive still another ruling on the merits,[330] while the hapless accused who has failed to make particular objections in state court loses not only the right to litigate those issues in that tribunal, but also the right to secure a decision on the merits of the claims in federal court.

There is nothing inherent in the concepts of either federalism or comity that required or even made it desirable for the *Noia* Court to use the deliberate bypass rule as a means of imposing a forfeiture of federal remedies. The federal statutory requirement that defendant exhaust currently available state remedies protects all valid state interests by compelling defendants to raise their constitutional claims initially in state court.[331] The states thus have the option of providing collateral remedies for defaulting defendants and using such proceedings to reach the merits of all constitutional claims asserted by state prisoners. The state courts have an added incentive

329. *See* Fay v. Noia, 372 U.S. 391, 433, 438-40 (1963). Professor Reitz viewed the deliberate bypass rule as a doctrine that would prevent the undermining of the section 2254 requirement that prisoners exhaust their state remedies. Reitz, *supra* note 15, at 1315, 1368-70; *see* AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO POST-CONVICTION REMEDIES § 6.1 (Approved Draft 1968) (Professor Reitz was the Reporter to the Advisory Committee on Sentencing and Review for the report on Post-Conviction Remedies.). Section 6.1 in effect adopts a deliberate bypass test as the means for determining the availability of state postconviction relief in the event of a procedural default at trial or on appeal.

330. *See* Townsend v. Sain, 372 U.S. 293, 318 (1963).

331. This of course assumes that the statutory exhaustion requirement applies only to currently available state remedies, as the Court held in *Noia*. *See* 372 U.S. at 399, 434-35.

A study of federal habeas actions by state prisoners in Massachusetts during 1970-1972 disclosed that over fifty percent of such petitions were dismissed for failure to exhaust state remedies. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 356 (1973).

to decide all such claims on the merits: if this is done, it is possible to develop a record showing that the accused received a full and fair hearing and that the state's rejection of the constitutional contention is fairly supported by the evidence. Such a record will ordinarily defeat a plenary hearing in federal court.[332] If a state chooses instead to deny relief on the basis of a procedural default in order to assure the orderly utilization of its procedures or to conserve its judicial resources, the state surely has a right to do so. That calculated decision by the state to vindicate its particular interests should not, however, have any effect on the prisoner's right of access to the federal courts.

To be sure, if the exhaustion doctrine constituted the only barrier to federal habeas relief, there would be a residuum of federal-state friction in those states that chose not to provide collateral remedies for resolution of the underlying constitutional claims on the merits. In those jurisdictions state prisoners would be free to proceed to federal court to litigate such claims notwithstanding a state determination that its ignored procedures are of paramount importance and that a forfeiture should be imposed. It should be noted, however, that defendants whose constitutional claims are resolved on the merits through established state collateral procedures and defendants who commit no procedural errors and thus receive a hearing on the merits in state court are nonetheless able to press their constitutional claims in federal habeas actions—arguably an even greater insult to the states.[333] This sort of conflict is inevitable in a federal system in which power is distributed between the two sovereignties, but in which the federal courts are given final authority with respect to the meaning of federal constitutional rights. Through its supremacy clause, the Constitution decrees that in certain areas ultimate power rests in the federal government.

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332. *See* Townsend v. Sain, 372 U.S. 293, 312-13 (1963).

333. In such cases, however, the "insult" to the state is mitigated by the fact that state court resolution of factual matters will be given great weight by the federal habeas court. *See id.*

Indeed, if anxiety over federal-state friction is of paramount concern to the Court, the miscarriage-of-justice standard alluded to in *Sykes* might well result in still greater tension between the two sovereignties. Under *Noia* and its deliberate bypass test, if there was a federal habeas hearing notwithstanding a state procedural default, the state did not lose face as a result of the federal court's deciding a federal constitutional claim. If, however, as a prelude to such a determination, the federal court must first rule that the state trial was such a travesty that it resulted in a miscarriage of justice, this frontal assault on the integrity of the state judicial system can hardly be rationalized away as federal dabbling with federal constitutional rights. If the cause and prejudice requirements are applied in as harsh a manner as the *Sykes* opinion suggests, however, this apprehension of increased federal-state tension will undoubtedly be rendered illusory.

In view of these rather substantial arguments against imposition of any deliberate bypass rule, one may wonder why the *Noia* Court nonetheless spawned a concept that has required so much additional litigation and caused so much confusion.[334] As originally formulated, the deliberate bypass rule placed a heavy burden of proof on the states. This burden would, in many instances, have necessitated federal court bypass hearings more lengthy than the hearings required to decide the merits.[335] Thus, a possible explanation for the rule's

334. For example, in his concurring opinion in *Sykes,* Justice Stevens stated that that decision was "consistent with the way other federal courts have actually been applying *Fay,*" and cited a number of lower court decisions in support of the foregoing proposition. *See* 433 U.S. 72, 94 & n.1. Justice Brennan in dissent cited a group of cases in support of the view "that the bypass formula has provided a workable vehicle for protecting the integrity of state rules in those instances when such protection would be both meaningful and just." *See id.* at 102 & n.4.

Interestingly, six of the cases cited by Justice Brennan were also relied upon by Justice Stevens. For example, Moreno v. Beto, 415 F.2d 154 (5th Cir. 1969), was cited by Justice Stevens for the proposition that "even a deliberate choice by trial counsel has been held not to be a 'deliberate bypass' when the result would be unjust" and by Justice Brennan as a case in which *Noia* provided "a meaningful standard governing the scope of federal collateral review." The *Moreno* court found no deliberate bypass in failing to challenge confession on voluntariness grounds, notwithstanding strategic decision by counsel apparently acquiesced in by the defendant because at time of trial there was no constitutionally adequate procedure for such a challenge.

United States *ex rel.* Green v. Rundle, 452 F.2d 232 (3d Cir. 1971), was cited by Justice Stevens as an example of a case in which defendant's personal participation was not required and by Justice Brennan as a case in which bypass was found as a result of the tactical nature of the defense decision. The defense attorney's failures to object to consolidation of charges and to request cautionary instructions were found to be tactically motivated, but were not participated in by the petitioner; and this tactical choice regarding consolidation of charges was made notwithstanding defense attorney's unawareness that evidence with respect to one of the charges was extremely prejudicial. The *Rundle* court nonetheless found deliberate bypass, rejecting defendant's claim of ineffective assistance of counsel and his claim that his attorney insisted on a jury trial over his objection.

Paine v. McCarthy, 527 F.2d 173 (9th Cir. 1975) (per curiam), *cert denied,* 424 U.S. 957 (1976), was cited by Justice Stevens for the position that "a decision by counsel may not be binding if made over the objection of the defendant" and by Justice Brennan as an example of a case allowing federal habeas review where there was no tactical basis for the default. The *Paine* court found no deliberate bypass where defendant requested his attorney to present speedy trial issue on direct appeal and his attorney advised against doing so. It is conceivable that there was a tactical basis for not including this contention on appeal, namely that counsel thought that the claim was frivolous and that it would obscure more meritorious issues.

335. *See, e.g.,* Mottram v. Murch, 330 F. Supp. 51, 55 (D. Me. 1971) (four-day hearing on the issue of deliberate bypass), *rev'd,* 458 F.2d 626 (1st Cir.), *rev'd per curiam,* 409 U.S. 41 (1972).

In other contexts, the Court has proceeded to decide the merits of claims in order to avoid more difficult threshold issues. *See* Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 847 (1977) (refusing to decide whether plaintiffs

creation is that the Court believed that the states would rarely assert claims that the defendant deliberately bypassed state procedures because of the difficult and time-consuming process of proving the claim or because the state itself desired a federal determination of the constitutional issue on the merits.[336] In addition, the Court may have thought that state courts would, after *Noia,* be more likely to decide federal claims on the merits notwithstanding procedural defaults.[337] Thus, under this view of the effect of *Noia,* the bypass requirement would not have constituted a heavy drain on federal judicial resources. Alternatively, because the Court was abolishing its earlier stringent forfeiture rule, it may have desired to give some assurance to the states that the federal courts would continue, at least in certain circumstances, to give a degree of deference to state procedural defaults and thus assure finality in a limited range of cases. Finally, the deliberate bypass rule can also be viewed as recognizing a measure of personal accountability by prohibiting the defendant who, after discussion with competent counsel, made a tactical determination not to assert a particular claim in state court from nevertheless being able to do so in a federal forum.

Whatever the original motivation for engrafting the deliberate bypass limitation onto the *Noia* ruling, the ensuing difficulties in applying the doctrine could have been obviated and a more workable solution effected simply by elimination of the bypass rule as a barrier to federal habeas relief.[338]

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possessed a liberty interest under the fourteenth amendment); Katzenbach v. Morgan, 384 U.S. 641, 656-57 (1966) (avoiding decision on standing issue).

336. *See* Kibbe v. Henderson, 534 F.2d 493, 496 & n.4 (2d Cir. 1976), *rev'd on other grounds,* 431 U.S. 145 (1977).

337. *See* Henry v. Mississippi, 379 U.S. 443, 453 (1965) ("It has been suggested that . . . [federal-state] friction might be ameliorated if the States would look upon our decisions in *Fay* v. *Noia* . . . and *Townsend* v. *Sain* . . . as affording them an opportunity to provide state procedure, direct or collateral, for a full airing of federal claims.") (citations and footnote omitted).

338. *But see* Shapiro, *supra* note 331, at 346-49. Professor Shapiro found, on the basis of his study of federal habeas in Massachusetts, that *Noia* may not have had "as substantial an impact as has sometimes been suggested . . . . [I]t has not flooded the courts with petitioners who have inadvertently forfeited their state remedies." *Id.* at 349. The lessened impact resulted from state courts determining federal claims of allegedly defaulting defendants on the merits and from federal court findings of bypass, utilizing *Henry v. Mississippi* to impute defaults to defendants. Professor Shapiro concluded that, to the extent *Noia* provided an impetus to the states to resolve federal claims on the merits, such a " 'spillover' effect . . . is one of the strongest arguments in favor of the jurisdiction in its present form." *Id.* at 348 n.144.

B. The Institutional Implications of the *Sykes* Decision

1. *The Finality Rationale in Light of the State's Role and the Affected Prison Population*

It can fairly be said that abolition of the deliberate bypass doctrine as a limitation on federal habeas was not an option that would have been viewed with great favor by the Burger Court majority. Instead, the *Sykes* decision imposed considerably more stringent restrictions upon the availability of habeas in the case of state prisoners who committed procedural defaults in asserting constitutional claims. The ultimate rationale for the increasingly restrictive approach taken by the present Court is, in all probability, the need for assuring finality in criminal cases.[339]

To be sure, there can be little doubt about the value of putting an end to litigation of criminal cases once a defendant's constitutional claims have been fully and fairly adjudicated on the merits.[340] Where finality is insisted upon in the absence of such an adjudication on the merits, however, a value choice has been made that in a world of finite resources[341] it is preferable that a matter be resolved quickly

339. According to Justice Brennan, "the only thing clear about the Court's 'cause'-and-'prejudice' standard is that it exhibits the notable tendency of keeping prisoners in jail without addressing their constitutional complaints." Wainwright v. Sykes, 433 U.S. 72, 116 (1977) (Brennan, J., dissenting).

340. There are indications that a substantial minority of federal habeas attacks by state prisoners do not relate to their state court convictions and thus do not disturb the finality thereof. Professor Shapiro's study in Massachusetts disclosed that "less than 60% of the state prisoner habeas applications were attacks on the validity of state criminal convictions." Shapiro, *supra* note 331, at 330. The remaining applications included challenges to indeterminate commitments of sexually dangerous persons, attacks against excessive bail pending trial, complaints relating to prison conditions, and parole revocation challenges. *See id.* at 328-30.

341. The *Sykes* opinion does not rely on a floodgates argument, but that concern was evinced in a dissenting opinion in *Noia*, *see* Fay v. Noia, 372 U.S. 391, 445-46 (1963) (Clark, J., dissenting), and it is clear that conservation of federal judicial resources is a continuing concern of the present Court. This concern, however, should be evaluated in light of the actual number of state habeas petitions filed in the federal courts.

As of June 30, 1976, there were 140,189 civil cases pending in the United States District Courts, an increase of 17.1% over the number pending on the same date in 1975. Of these 140,189 civil cases, 3,715 (or 2.65%) were state habeas corpus petitions, an increase of 13.2% over the preceding year. [1976] U.S. Director Ad. Off. of the Courts Ann. Rep. Table 20, at 181. During the fiscal year 1976, 7,389 state habeas petitions were filed in the United States District Courts, and the median time for their disposition was two months. Of the total number filed, 7,080 were disposed of before the pretrial stage, 106 were concluded during or after pretrial, and 200 were disposed of by trial. *Id.* Table C-5B, at 324.

According to a 1969-1970 time study of the United States District Courts conducted for the Federal Judicial Center, state habeas actions comprised 6.704% of the civil cases filed and occupied 5.195% of the judges' time. By comparison, the major category of diversity contract actions (entitled "Other Contract Actions") comprised

than that it be resolved correctly. The mass of defendants surely wish to avoid default in order to make maximum use of both state and federal court remedies. If the Court is concerned that federal habeas will be abused by the wily jailhouse lawyer who slyly waits months or years to raise constitutional claims, hoping to prevail because adverse evidence relating to the alleged constitutional defect and the underlying criminal charge will have disappeared,[342] it is clear that the class of defendants engaging in such maneuvers is extremely limited. It is not unreasonable to assume that the overwhelming majority of prisoners bringing federal habeas actions are anxious to secure their release as quickly as possible. In any event, the Rules Governing Section 2254 Cases recently promulgated by the Supreme Court take care of this problem, for the most part, by inclusion of a laches provision permitting the state to show prejudice as a result of the prisoner's delay and, in the event of such a showing, requiring the prisoner to prove that the petition "is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred."[343] Thus, any conceivable problem posed by this category of malingering Rip Van Winkle claimants is clearly de minimis.

8.265% of the civil cases and took up 10.992% of the judges' time; motor vehicle diversity tort actions made up 11.841% of civil cases and occupied 9.828% of the judges' time. U.S. DEP'T OF AGRICULTURE STATISTICAL REPORTING SERVICE AND GRADUATE SCHOOL, 1969-70 FEDERAL DISTRICT COURT TIME STUDY Table XVII, at 66C-66D (1971).

Thus, the total number of federal habeas petitions by state prisoners is clearly not overwhelming, either in an absolute sense or relative to other federal civil actions. Moreover, the vast proportion of the petitions filed are dismissed without hearings. There are also indications that the hearings that are conducted are of brief duration. *See* Shapiro, *supra* note 331, at 335-37. Furthermore, if the appointment of counsel was made mandatory, cases could be processed even more expeditiously since many pro se petitions are unintelligible and since counsel would be able not only to focus the issues but also to determine whether state court action was either required or would be more efficacious. *See id.* at 342-46. Finally, the availability of federal habeas should not be made dependent on budgetary considerations. The Court should look to Congress for increased funding rather than looking, consciously or unconsciously, for means of curtailing federal habeas relief.

342. *See* Francis v. Henderson, 425 U.S. 536, 540-42 (1976). *See also* Note, *supra* note 15, at 90.

343. R. GOVERNING § 2254 CASES 9(a). It is interesting to note that the Rule as originally promulgated by the Court included the following provision:

> If the petition is filed more than five years after the judgment of conviction, there shall be a presumption, rebuttable by the petitioner, that there is prejudice to the state. When a petition challenges the validity of an action, such as revocation of probation or parole, which occurs after judgment of conviction, the five-year period as to that action shall start to run at the time the order in the challenged action took place.

H.R. REP. No. 464, 94th Cong., 2d Sess. 8, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2485. These provisions were eliminated by Congress. Act of Sept. 16, 1976, Pub. L. No. 94-426, 90 Stat. 1334 (1976). The Rules became effective February 1, 1977.

The substantially broader class of prisoners adversely affected by the Court's recent rulings on state procedural defaults are not cunning, longtime writ writers. Rather, they are uninformed, uneducated individuals who are unrepresented at the time they file their writs.[344] In addition, it is possible that such prisoners did not receive the best of representation prior to conviction,[345] and they may have been unaware of the constitutional rights their attorneys gave up in their names or of the dire forfeitures resulting therefrom. Moreover, quite possibly their attorneys failed to assert these rights as a result of ignorance, inadvertence, or inertia and not as part of a series of canny strategic maneuvers. To impose forfeitures on this vastly larger group of defendants is simply an unfair tradeoff of the many for the few.

The state's interest in assuring the finality of its judgments of conviction should not act as a bar to federal habeas, particularly in cases such as those involving racial discrimination in grand jury selection where the state itself has established the allegedly unconstitutional process. In effect, the state has taken a calculated risk that, for a variety of reasons, defendants such as Abraham Francis will not attack the selection process. It is unclear why this type of tactical choice by the state, which is the analogue to deliberate, tactical choices by defendant to forgo constitutional claims, should be any less binding on the wily state government.

Other constitutional claims, such as coerced confessions, even though not stemming from a deliberate policy decision on the part of the state, involve acts by agents of the state who in at least some cases make deliberate decisions to violate defendant's constitutional rights,[346] aware that such claims are frequently not litigated because

344. *See* Shapiro, *supra* note 331, at 330-31, 342.

345. *See id.* at 331 & n.54 (noting the frequency of claims relating to ineffective assistance of counsel).

346. *Cf.* Terry v. Ohio, 392 U.S. 1, 14 (1968) (footnote omitted):

> Regardless of how effective the [exclusionary] rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.

See also Younger, *The Perjury Routine,* 3 CRIM. L. BULL. 551 (1967) ("Every lawyer who practices in the criminal courts knows that police perjury is commonplace."); N.Y. Times, Aug. 12, 1977, § A, at 22, col. 1. The *New York Times* article describes the arrest and interrogation of a person believed by California authorities to be a mass killer (the alleged perpetrator of the "trash bag" murders). According to the article, law enforcement officials in other counties in which the defendant is a suspect have criticized officials in the arresting county for making a possibly illegal search and seizure. One such rival official noted, however, that " '[e]ven if they did foul up the arrest, I don't think there's a judge in the country who would have the guts to throw a case of this magnitude out.' " *Id.* at col. 2.

of the high percentage of guilty pleas.[347] Thus, the state's agent has taken a calculated risk, and if there are to be imputations of defense counsel's defaults to the defendant, a fortiori, the misconduct of the state's agent should be imputed to the sovereign; the latter should not escape scrutiny as a result of defendant's procedural default.[348] Moreover, the question of imputation must be considered in light of the equitable nature of the habeas action. In balancing the state's and society's interest in finality against defendant's and society's interest in vindication of constitutional rights, it should be taken into account that the state, with its overwhelming power vis-à-vis the defendant, has voluntarily chosen its agents who have allegedly committed unconstitutional acts, whereas, in the great majority of cases with which we are dealing, the indigent defendant has had no opportunity to select the attorney of his or her choice.[349] Indeed, defense counsel is also, in a sense, the state's agent. Thus, one agent of the state has engaged in an alleged constitutional violation, and another has committed a procedural default that precludes any court from determining the merits of the resulting constitutional claim. Accordingly, in terms of access to federal court, there should be a recognition that imputation is a two-way street and there should, at the

347. *See* Tigar, *supra* note 119, at 21. *See generally* D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 (1966) ("Roughly 90 percent of all criminal convictions are by pleas of guilty . . . ."); Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1206 n.84 (1975); Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293, 295 & app. I & II (1975). Finkelstein found that the percentage of guilty pleas in federal district courts other than the District of Columbia in 1974 was 60.5%, the range among 29 districts being from 35% to 72.6%. On the basis of statistical analysis, the author was able to conclude that "the pressure on defendants to plead guilty in the federal courts has induced a high rate of conviction by 'consent' in cases in which no conviction would have been obtained if there had been a contest." *Id.* at 295.

348. *But see* Stone v. Powell, 428 U.S. 465, 493-94 (1976). The Court in *Stone* concluded that allowing fourth amendment exclusionary rule challenges in federal habeas actions would have a minimal incremental deterrent effect. The Court felt that violations were sufficiently punished by suppression of illegally seized evidence by the state courts or by the Supreme Court on direct review and that imposition of any additional sanction via a federal habeas action was unwarranted. On the other hand, state prisoners whose attorneys have inadvertently defaulted in the assertion of constitutional claims in state court (the analogue of inadvertent fourth amendment violations by state police officials) now forfeit not only their state remedies and direct Supreme Court review, but also their federal habeas remedies as well, unless they can somehow scale the "cause" and "prejudice" wall, the heights of which are currently unknown. Thus, at least in the case of the fourth amendment, sanctions against the police end in the state courts, whereas sanctions against those who are charged with crimes by these same officials and who engage unwittingly in procedural defaults are applied not only in state court, but in federal habeas courts as well.

349. Alschuler, *supra* note 347, at 1242.

least, be great reluctance to hold the defendant accountable for the defaults of his or her attorney.

In sum, whatever the defects of the deliberate bypass test formulated in *Noia,* the substitute put forward in *Sykes* seems far less satisfactory. Moreover, by reinstituting the adequate state ground rule as a bar to federal habeas in the absence of cause and prejudice and by eliminating habeas jurisdiction with respect to those categories of constitutional claims that allegedly do not affect the fundamental fairness of the fact-finding procedure,[350] the Court is effectively destroying a number of the practical benefits of federal habeas jurisdiction.

2. *Federal Habeas—Safety Valve or Practical Joke?*

One may question the value of the federal habeas jurisdiction in view of the infrequent occasions on which relief is granted.[351] Aside from the obvious usefulness to these rare beneficiaries, however, there are indications that, even with respect to those petitioners whose writs are denied or dismissed, substantial advantages accrue as a result of the availability of the federal writ. According to one authority, institution of the suit sometimes precipitates action by state authorities that puts "derailed" state processes back in motion;[352] moreover, even where the state court has already decided the prisoner's claims on the merits, "there is value in having independent, relatively disinterested federal confirmation of the correctness of a state conviction, in that there is one guaranteed federal review of the federal questions that are now bound to arise in so many criminal cases."[353] A fortiori, where the state courts have refused to consider the prisoner's federal claim on the basis of a procedural default, the federal habeas court can play an even more valuable role.

Approached from another perspective, the Court has suggested

350. *See* Wainwright v. Sykes, 433 U.S. 72, 87 n.11 (1977); Castaneda v. Partida, 430 U.S. 482, 508 n.1 (1977) (Powell, J., dissenting); Brewer v. Williams, 430 U.S. 387, 413-14 (1977) (Powell, J., concurring); Stone v. Powell, 428 U.S. 465 (1976).

351. During the fiscal year 1976, the median time for disposition of section 2254 actions in the United States District Courts was two months, and only 2.7% of such actions reached the trial stage. [1976] U.S. DIRECTOR AD. OFF. OF THE COURTS ANN. REP. Table C-4, at 313, Table C-5B, at 324. From these statistics, it is reasonable to infer that the vast majority of federal habeas actions do not result in dispositions favorable to the petitioner. *See* Shapiro, *supra* note 331, at 335-37.

352. Shapiro, *supra* note 331, at 342. For example, one "petitioner filed a pro se state habeas corpus petition in December 1970; it was not acknowledged by the clerk until October 1971, and nothing further happened until a federal petition was filed in March 1972. At that point, a state hearing . . . was scheduled . . . ." *Id.* at 341 (footnotes omitted).

353. *Id.*

that one value of a guilty plea (which can only be entered knowingly by the accused personally) is its demonstration that the defendant "is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation."[354] Unless the Court has accepted the concept of rehabilitation only as a basis for insulating guilty pleas from attack, presumably that concept has some applicability with respect to defendants who are convicted after trial. The extent to which any such rehabilitation may be achieved in the case of defendants convicted after trial may depend upon whether the judgment of conviction is perceived as rational and fair. Such a perception is less likely if the prisoner belatedly discovers that state court consideration of his or her constitutional claim on the merits is precluded because defense counsel committed a procedural default of which the prisoner was unaware and also learns that conviction might have been avoided entirely or that conviction of a lesser offense might have been secured had the claim been properly asserted. In this situation, the availability of a federal forum to secure a hearing on the merits may aid in deflecting hostility and in promoting whatever rehabilitative aspects the state correctional system affords. After the *Sykes* decision, however, there is little likelihood that the federal courts can play any such role.

Sykes may also be viewed as operating at least partially at cross-purposes with the Supreme Court's recent ruling that the states have an affirmative obligation to assure access to courts by providing adequate law libraries or alternative methods of assisting prisoners in the presentation of claims.[355] In so holding, the majority noted that 95% of state correctional officials who responded to a national survey favored creation and expansion of prison legal services and that "over 80% felt legal services provide a safety valve for inmate grievances, reduce inmate power structures and tensions from unresolved legal problems, and contribute to rehabilitation by providing a positive experience with the legal system."[356] By assuring prisoner access to

354. Brady v. United States, 397 U.S. 742, 753 (1970). To be sure, the Court noted in *Brady* that many pleas are based on the defendant's wish to minimize punishment. *See id.* at 752.

The text accompanying this footnote is not intended to endorse the view that imprisonment is a means of effecting rehabilitation, a concept about which considerable doubt has been expressed. *See* L. WILKINS, EVALUATION OF PENAL MEASURES 78 (1969); Bailey, *Correctional Outcome: An Evaluation of One Hundred Reports*, in 3 CRIME AND JUSTICE 187 (L. Radzinowicz & M. Wolfgang eds. 1971); Hood, *Some Research Results and Problems*, in 3 CRIME AND JUSTICE 159 (L. Radzinowicz & M. Wolfgang eds. 1971); Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22 (1974).

355. Bounds v. Smith, 430 U.S. 817 (1977).

356. *Id.* at 829 n.18 (citing Cardarelli & Finkelstein, *Correctional Administrators Assess the Adequacy and Impact of Prison Legal Services Programs in the United States*, 65 J. CRIM. L. & CRIMINOLOGY 91, 95-98 (1974)). *See Symposium—*

legal services or law libraries, the Court in effect provides the opportunity for more meaningful utilization of the writ and may increase the prisoner's expectations concerning its availability.[357] If, at the same time, the Court's decisions in fact restrict the availability of federal habeas, a double bind may be created,[358] and the prisoner may perceive the law as being totally irrational. An inmate who did not participate in and was wholly unaware of the state court procedural default is handed the keys to the library and told to scrutinize the law books with great care, for he or she now has the almost impossible burden of not only establishing the merits of a constitutional claim, but also explaining the reason for counsel's inaction and demonstrating that such passivity resulted in prejudice above and beyond the possible loss of a constitutional right and the use of allegedly unconstitutional evidence to secure a conviction. At the same time that the requirement of the prisoner's personal participation in the default is being eliminated, the defendant, a layperson, is being required to explain away a lawyer's failures and to prove that this inaction has resulted in such extreme prejudice that a miscarriage of justice has occurred.

It is almost as if the Court had advised state prisoners that they could secure relief, provided they were able to run a mile in under four

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Habeas Corpus—Proposals for Reform, 9 UTAH L. REV. 18, 30 (1964) (remarks of Paul Freund):

> I am inclined to believe from the little that I hear about these things that actually the availability of collateral relief is a very wholesome form of therapy in the prisons. It keeps the men from planning jail breaks, and the wardens say, "fine, if you can have a jail delivery by order of the Supreme Court, we are all with you; just do not use a pick and shovel." It puts them in the law library at the penitentiary, and we all agree that that is a very healthy state of affairs. It gives them something to hope for. On balance, I am inclined to think that it is probably better penology than the strict closing of doors.

357. The relationship between access to prison libraries and the availability of federal habeas was tacitly acknowledged in Justice Powell's concurring opinion in *Bounds*: "[T]he holding here implies nothing as to the constitutionally required scope of review of prisoners' claims in state or federal court." 430 U.S. at 833.

Chief Justice Burger, in his dissenting opinion, stated "that there is no broad federal *constitutional* right to . . . collateral attack" in federal court by state prisoners. *Id.* at 835. He therefore concluded that the Court's holding implied either that there was such a constitutional right or that "States can be compelled by federal courts to subsidize the exercise of federally created statutory rights." *Id.* at 836.

358. *Cf.* 2 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, Glossary, at 2583 (2d ed. A. Freedman, H. Kaplan, & B. Sadock 1975) ("Double bind. Two conflicting communications from another person. One message is usually nonverbal and the other verbal. For example, parents may tell a child that arguments are to be settled peacefully and yet battle with each other constantly.").

The law libraries decision does of course have value in other judicial contexts, such as civil rights actions brought pursuant to 42 U.S.C. § 1983 (1970).

minutes at an event called "the merits race," and the Court further told inmates that, to prepare for the race, they would be given track shoes, stop watches, and reasonable access to a well-manicured track. The prisoner, after extensive training utilizing these facilities, arrives at the track only to discover a new entrance requirement—he or she must first perform a seventeen-foot pole vault. To accomplish this herculean feat, the prisoner is provided with a petrified pogo stick.

3. *The Dilemma of Ineffective Assistance*

As a result of the decision to scuttle *Noia,* the Court will be compelled to deal meaningfully with the issue of ineffective assistance of counsel.[359] Although *Noia* required consultation with competent counsel, direct confrontation of that issue could be deflected by the decision's additional requirements that the default be tactically motivated and that the accused personally participate in the bypass.[360] *Sykes* effectively eliminates both of these requirements. Moreover, its cause and prejudice tests inexorably focus attention on the performance of defense counsel. Thus, the urgency of providing guidelines for determinations of ineffective assistance will be enhanced as more and more habeas petitions are denied because of the procedural defaults of marginally effective attorneys, consequently requiring prisoners who are thereby precluded from asserting other constitutional claims to allege incompetency of counsel, either as a means of satisfying the cause and prejudice requirements in *Sykes*[361]

359. *See* Wainwright v. Sykes, 433 U.S. 72, 118 (1977) (Brennan, J., dissenting):

> If the scope of habeas jurisdiction previously governed by *Fay* v. *Noia* is to be redefined so as to enforce the errors and neglect of lawyers with unnecessary and unjust rigor, the time may come when conscientious and fair-minded federal and state courts, in adhering to the teaching of *Johnson* v. *Zerbst,* will have to reconsider whether they can continue to indulge the comfortable fiction that all lawyers are skilled or even competent craftsmen in representing the fundamental rights of their clients.

360. *See* Humphrey v. Cady, 405 U.S. 504, 517 (1972), *discussed at* notes 74-85 *supra* and accompanying text. To the extent that *Henry* curtailed the personal participation requirement, it may have focused some attention on the issue of ineffective assistance. *Henry* was, however, presumably limited to tactically motivated failures to make contemporaneous objections, whereas *Sykes* contains no such limitations.

361. Since the Court did not define either of these requirements, it is unclear whether a showing of ineffective assistance alone would be sufficient to meet both tests. In Francis v. Henderson, 425 U.S. 536 (1976), *discussed at* notes 131-64 *supra* and accompanying text, the Court held that both requirements must be met. Since the district court in that case had already found the cause requirement satisfied because of ineffective assistance, the Supreme Court may have been implying that ineffective assistance alone was insufficient to meet both the cause and prejudice requirements. The district court had not considered the prejudice issue, however, and the Supreme Court's remand for a determination of the prejudice question is therefore not conclusive in this regard.

or as a separate sixth amendment claim.[362]

Inasmuch as the *Sykes* majority focused on the possibility of a miscarriage of justice in its discussion of the cause and prejudice requirements, it may be that a strong showing of ineffective assistance would be deemed sufficient to satisfy both tests. It should be noted, however, that the less effective counsel is, the less likely it is that there will be a record sufficient to disclose "actual prejudice." *See* notes 380-81 *infra* and accompanying text. As previously noted, the issue of ineffective assistance was not presented in *Sykes*.

It should also be pointed out that, in the event the Court determines that proof of ineffective assistance will not satisfy both requirements, prisoners are more likely to abandon attempts to meet the cause and prejudice standards in order to reach the underlying claim as to which there was a procedural default and will instead simply elect to assert sixth amendment challenges based on their attorneys' incompetence. In this connection, a distinction may be drawn between ineffective assistance with respect to the constitutional claim concerning which the default occurred and ineffective assistance with respect to the entire trial. If the Court determines that ineffective assistance regarding the defaulted claim satisfies only the cause requirement of *Sykes* and that ineffectiveness as to the entire proceedings must be shown in order to meet the prejudice test, it seems clear that defaulting prisoners will not bother to attempt to meet *Sykes'* dual requirements and will instead make straight sixth amendment attacks.

For instance, in Marzullo v. Maryland, 561 F.2d 540 (4th Cir.), *cert. denied*, 46 U.S.L.W. 3675 (U.S. May 2, 1978), which was argued before the *Sykes* decision was rendered, but decided thereafter and without citation to *Sykes*, the Fourth Circuit ruled that, in both trial and guilty plea contexts, it was abandoning the farce and mockery test for determining ineffectiveness and was instead adopting the standard announced in McMann v. Richardson, 397 U.S. 759, 771 (1970), with respect to plea cases, that counsel's performance must be "within the range of competence demanded of attorneys in criminal cases." 561 F.2d at 543. In its decision, the court directed that Marzullo's habeas petition, which was based on a claim of ineffective assistance, be granted. Interestingly, the sixth amendment contentions dealt with by the court were predicated on trial counsel's procedural defaults. Defendant was charged with rape in two separate cases. His trial attorney had (1) failed to seek exclusion of the prospective jurors although they had witnessed the dismissal of the first offense charged, (2) relinquished the right to peremptory challenges before the voir dire examination of these jurors had taken place, and (3) failed to request an instruction that the jury was not to consider the dismissed rape charge in its deliberations. *See id.* at 545-47.

In LiPuma v. Commissioner, 560 F.2d 84 (2d Cir.), *cert. denied*, 98 S. Ct. 189 (1977), however, a case decided after *Sykes*, the court, while apparently accepting the theory that an ineffective assistance claim could be a basis for defendant's failure to move for a suppression hearing, *id.* at 90, went on to state,

> The fact that petitioner's claim is ostensibly grounded on the Sixth, rather than the Fourth, Amendment does not negate *Stone's* applicability, because at the heart of this case lies an alleged Fourth Amendment violation. . . . The same remedy of exclusion is now sought by way of a collateral habeas corpus proceeding, where a Sixth Amendment claim has been added for good measure.

Id. at 93 n.6.

362. *See* Shapiro, *supra* note 331, at 349:

> [I]t is important to note that had *Noia* been decided differently, so that an adequate procedural ground would be a bar to federal habeas corpus, it

Issues relating to ineffective assistance may be considerably more difficult to resolve than other due process challenges. One indication of that difficulty is the Court's diffidence in resolving questions of incompetence in cases in which the defendant has proceeded to trial. For example, in *Chambers v. Maroney*,[363] a nonplea case touted in advance as the Court's "vehicle for dealing once and for all with the question of ineffective assistance,"[364] the majority almost casually dismissed the sixth amendment claim,[365] with only Justice Harlan addressing the issue fully and concluding that defendant was at least entitled to an evidentiary hearing on the matter.[366] In guilty plea cases, the Court has established a fluid standard of whether counsel's "advice was within the range of competence demanded of attorneys in criminal cases."[367] Although noting that defendants in felony cases were entitled to "effective assistance of competent counsel," the Court hastened to add that "the matter, for the most part, should be left to the good sense and discretion of the trial courts."[368] On the other hand, in contested cases, the Court's refusal to grapple with this issue has resulted in divergent lower court tests, with some tribunals adhering to the requirement that the trial be a sham or mockery[369] and others requiring reasonably competent assistance

would be harder than it is now for a criminal defendant to obtain relief notwithstanding a procedural default without a showing of ineffectiveness of counsel; such claims might therefore be even more common than they are today.

363. 399 U.S. 42 (1970).

364. *See* Bazelon, *supra* note 153, at 21.

365. *See* 399 U.S. at 54 ("In this posture of the case we are not inclined to disturb the judgment of the Court of Appeals as to what the state record shows with respect to the adequacy of counsel.").

366. *See id.* at 55-60 (Harlan, J., concurring in part and dissenting in part). Justice Harlan noted that new counsel for defendant who entered the case immediately preceding retrial had made no objection to introduction of certain evidence notwithstanding a possible fourth amendment violation, that his objection as to other evidence indicated that he did not know the basis for its exclusion during the first trial, and that his cross-examination of a prosecution witness suggested that the attorney had not worked out a trial strategy and was uncertain whether the accused would testify.

367. McMann v. Richardson, 397 U.S. 759, 771 (1970).

368. *Id.*; *accord,* Dukes v. Warden, 406 U.S. 250 (1972).

369. *See, e.g.,* LiPuma v. Commissioner, 560 F.2d 84, 90-91 (2d Cir.), *cert. denied,* 98 S. Ct. 189 (1977); United States v. Riebold, 557 F.2d 697, 703 (10th Cir.), *cert. denied,* 98 S. Ct. 186 (1977); United States v. Stern, 519 F.2d 521, 524 (9th Cir.), *cert. denied,* 423 U.S. 1033 (1975); United States v. Katz, 425 F.2d 928 (2d Cir. 1970).

LiPuma was a post-*Sykes* decision adhering to the farce and mockery standard where defense counsel's alleged ineffectiveness was a failure to make a fourth amendment suppression motion. As an explanation for maintaining this rigorous standard, the court stated, "[P]etitioners are more likely than not to equate their failure to escape conviction with their counsel's alleged incompetence, regardless of the evidence against them and other circumstances attendant upon a particular trial." 560 F.2d at 90.

and looking to the American Bar Association Criminal Justice Standards[370] as guidelines in this regard.[371]

To be sure, in the guilty plea context, the Court may be able to continue glossing over the issue of incompetence because the almost ritualistic state court record with respect to entry of the plea will generally not disclose the deficiencies of counsel;[372] at most, the re-

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In *United States v. Katz*, Judge Friendly did not denominate the test applied as a sham or farce standard, but instead purported to consider whether defense counsel's conduct prevented the accused "from receiving a fair trial." 425 F.2d at 931. Defense counsel had advised the trial judge that he did not want to be on the case and was simply doing his duty. In the course of doing his duty, Katz' trial attorney fell asleep during the examination of a witness by another lawyer. *Compare* United States v. Easter, 539 F.2d 663 (8th Cir. 1976), in which the court reversed a conviction on ineffective assistance grounds, where counsel failed to object to evidence whose seizure involved an apparent violation of the fourth amendment. The Eighth Circuit noted,

> As we perceive the standard established in our prior decisions it is that trial counsel fails to render effective assistance when he does not exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances . . . . When he fails in the performance of this duty the proceedings may be said to have been reduced to a "farce" and "mockery of justice."

Id. at 666 (citation and footnote omitted). On retrial, Easter's judgment of conviction was affirmed. *See* United States v. Easter, 552 F.2d 230, 235-36 (8th Cir.), *cert. denied*, 98 S.Ct. 145 (1977), *discussed at* note 409 *infra*.

370. *See* note 284 *supra*.

371. *See, e.g.*, United States v. DeCoster, 487 F.2d 1197, 1203-04 (D.C. Cir. 1973); Coles v. Peyton, 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968). In the *Coles* case the Fourth Circuit stated,

> Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.

Id. at 226 (footnote omitted).

372. *See* United States v. Simpson, 475 F.2d 934, 939-40 (D.C. Cir.) (Bazelon, J., dissenting), *cert. denied*, 414 U.S. 873 (1973). In a per curiam decision, the *Simpson* majority refused to set aside the guilty plea of a section 2255 movant whose attorney had a severe drinking problem, had no office, and whose attendance at the section 2255 proceeding was made possible only by the issuance of a warrant. *See id.* at 935-36. Judge Bazelon noted that "the attorney knows that he will not be required to demonstrate any preparation if his client pleads guilty" and suggested that a mechanism be established to check the quality of the attorney's assistance in the plea context. *Id.* at 939-40. Similarly, in McMann v. Richardson, 397 U.S. 759, 763-64 (1970), one petitioner alleged that assigned counsel spoke with him for only ten minutes before a plea was entered and advised him that his coerced confession claim could be litigated later by a writ of habeas corpus; another petitioner alleged that his counsel ignored an alibi defense and erroneously advised him that the plea was only to a misdemeanor.

cord will reflect a voluntary plea,[373] waiver of the right to trial,[374] the existence of a bargain,[375] defendant's admission of the factual allegations underlying the crime charged,[376] and his or her awareness of the elements of the crime.[377] It will not, however, disclose the amount and quality of work performed by the attorney, whether there was a sound basis for deciding to plead guilty rather than to go to trial, or whether defendant was aware of possible antecedent constitutional defenses that were lost as a result of the plea. This sparse record by itself will be insufficient to raise the claim of ineffective assistance of counsel. The evidentiary hearing, if any, with respect to that claim will consist of testimony dehors the record. Basically, this will include defendant's testimony, which is suspect, arrayed against that of his or her attorney and, perhaps, the prosecutor and trial judge.[378]

With respect to defendants who proceed to trial, however, incompetence is somewhat more difficult to bury. Lack of factual investigation and legal research may be more readily reflected in the record

373. *See* Brady v. United States, 397 U.S. 742, 750 (1970).

374. *See* Boykin v. Alabama, 395 U.S. 238 (1969).

375. *See* Santobello v. New York, 404 U.S. 257 (1971).

376. *Cf.* North Carolina v. Alford, 400 U.S. 25 (1970) (even though defendant asserted his innocence, Court upheld guilty plea because the state presented strong evidence of guilt and because defendant clearly wished to enter the plea at the time it was made); AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 1.6 (Approved Draft 1968) ("Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as may satisfy it that there is a factual basis for the plea.").

377. *See* Henderson v. Morgan, 426 U.S. 637 (1976).

378. *See, e.g.*, United States v. Corbett, 405 F. Supp. 473, 476 (W.D. Mo.), *aff'd per curiam*, 524 F.2d 234 (8th Cir. 1975); United States *ex rel.* Johnson v. Mancusi, 401 F. Supp. 531, 533, 535 (S.D.N.Y.), *aff'd mem.*, 535 F.2d 1244 (2d Cir. 1975); Huffman v. Missouri, 399 F. Supp. 1196, 1202-04 (W.D. Mo. 1975), *aff'd per curiam*, 527 F.2d 899 (8th Cir.), *cert. denied*, 426 U.S. 924 (1976); *cf.* Blackledge v. Allison, 431 U.S. 63 (1977) (Court set aside the district court's summary dismissal of the prisoner's habeas petition, finding, *inter alia*, that his allegations of an unkept sentencing promise were buttressed by "specific factual allegations," including "the [exact] terms of the promise . . . ; when, where, and by whom the promise had been made; and the identity of one witness to its communication."). *But see* McAleney v. United States, 539 F.2d 282, 286 (1st Cir. 1976) (where retained trial counsel corroborated his client's allegation with respect to the terms of the plea bargain, the court stated that the defense lawyer's competence should be investigated and that "[t]here is also to be entertained the possibility of perjury and collusion aimed at upsetting the original sentence").

Even in nonplea cases, testimony by defense counsel at the habeas hearing has been viewed with skepticism. As noted by one court, "the evidence at the habeas corpus hearing . . . consisted entirely of testimony by defense lawyers saying in large measure what their respective defendants said to them. Though generally not objected-to, it was largely hearsay and self-serving and of limited probative force." LiPuma v. Commissioner, 560 F.2d 84, 92 n.3 (2d Cir.), *cert. denied*, 98 S. Ct. 189 (1977).

of the trial, and such evidence may be more likely to trigger an evidentiary hearing than in the plea context, where defendant is often relegated to making bald assertions of ineffectiveness unsupported by any objective extrinsic evidence. In the contested case, the trial record itself may provide support for defendant's allegations of incompetence.[379]

Paradoxically, in the case of truly inferior representation, the trial record may be so sparse that defendant may be unable to utilize it in support of his or her allegations of ineffectiveness.[380] If, for example, an attorney has failed to locate, interview, and subpoena alibi witnesses for the original trial, their testimony will necessarily not appear in the trial transcript. Such individuals may be impossible to find by the time a federal habeas hearing is conducted,[381] and even if they are located, the passage of time may have dimmed their recollections and reduced their ability to testify with assurance about the events in controversy. Moreover, if such deficient representation results in procedural defaults with respect to constitutional claims, defendant's unawareness of the existence and loss of the rights in question will delay assertion of the claims and may in turn feed the Court's perception of wily defendants asserting stale challenges. Thus, those prisoners receiving the worst legal assistance may be least able either to meet the cause and prejudice requirements of *Sykes* or to make independent sixth amendment attacks.

Such cases involving possibly innocent defendants, ambiguous trial transcripts, and representation of questionable quality are likely to present severe philosophical problems for the present Court because of its focus on due process rights affecting the accuracy and integrity of the fact-finding process,[382] its emphasis on implementa-

379. *See, e.g.*, Chambers v. Maroney, 399 U.S. 42, 56-58 (1970) (Harlan, J., concurring in part and dissenting in part); United States v. Fessel, 531 F.2d 1275, 1278-79 (5th Cir. 1976); United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 638 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975); United States v. DeCoster, 487 F.2d 1197, 1199-201 (D.C. Cir. 1973); United States v. Benn, 476 F.2d 1127, 1132-35 (D.C. Cir. 1973).

380. *See* United States v. DeCoster, 487 F.2d 1197, 1204 (D.C. Cir. 1973) ("[P]roof of prejudice may well be absent from the record precisely because counsel has been ineffective. For example, when counsel fails to conduct an investigation, the record may not indicate which witnesses he could have called, or defenses he could have raised.") (footnote omitted) (citing United States v. Thompson, 475 F.2d 931 (D.C. Cir. 1973) (per curiam) (appellate counsel asserted that trial counsel had failed to call four witnesses who would have testified on defendant's behalf and submitted affidavits from these witnesses)); United States v. Benn, 476 F.2d 1127, 1135 (D.C. Cir. 1973) ("Evidence of the inadequacy of trial counsel will often be outside the trial record—in some cases precisely because counsel has been ineffective.") (footnote omitted).

381. *See* United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 639-40 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975).

382. *See* Estelle v. Williams, 425 U.S. 501, 503-05 (1976).

tion of the reasonable doubt standard,[383] and its concern that habeas be preserved as a vehicle for those making colorable claims of innocence.[384] As a result of such factors as bail practices, the likelihood of reduced sentences, and pressures from defense counsel, an overwhelming majority of those accused of crime plead guilty.[385] The Court apparently believes that the solemn in-court admissions of these defendants in fact evidence guilt.[386] Thus, their subsequent claims of ineffective assistance may be deemed less compelling than those asserted by defendants who proceed to trial. One may reasonably assume that such hardy defendants who refuse to plead either consider themselves innocent or believe, for a variety of reasons, that the chances of acquittal are substantial.[387] Accordingly, since at least some of those who go to trial may in fact be innocent, and since the right to counsel is designed to assure the accuracy of the fact-finding process and implicates the reasonable doubt standard, dilution of the sixth amendment's competency requirement in contested cases would be at odds with the Court's avowed concern that habeas be maintained as a means of preventing miscarriages of justice.

Faced with these considerations, if the Court chooses to establish standards that actually implement the sixth amendment right to counsel in contested cases,[388] it may find that a substantial proportion of the criminal bar is unable to meet them, inasmuch as recent estimates indicate that the average level of performance by criminal lawyers may be disturbingly low.[389] If that is the case, a large number

383. *See* Hankerson v. North Carolina, 432 U.S. 233 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975). *But see* Patterson v. New York, 432 U.S. 197 (1977).

384. *See* Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977); Stone v. Powell, 428 U.S. 465, 490-91 (1976). *See also* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U. CHI. L. REV. 142 (1970).

385. *See* D. NEWMAN, *supra* note 347, at 3; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 134-36 (1967); Alschuler, *supra* note 347, at 1206 nn. 84 & 85, 1233-34; Tigar, *supra* note 119, at 21.

386. *See* Brady v. United States, 397 U.S. 742, 748, 757 (1970). *But see* Finkelstein, *supra* note 347.

387. In some instances, however, defendants may proceed to trial because the district attorney either is not permitted to or will not offer a plea bargain that the accused deems sufficiently advantageous. *See* N.Y. CRIM. PROC. LAW § 220.10, Supplementary Practice Commentaries (McKinney Supp. 1977); Memorandum from Richard H. Kuh, New York County District Attorney, to the Legal Staff of the District Attorney's Office (1974), *reprinted in* S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 1241-45 (3d ed. 1975).

388. For example, the ABA Defense Function Standards set forth minimum standards of competence. *See* ABA DEFENSE FUNCTION STANDARDS, *supra* note 284.

389. *See* Burger, *The Special Skills of Advocacy,* 42 FORDHAM L. REV. 227, 234 (1973) (footnote omitted):

Many judges in general jurisdiction trial courts have stated to me that fewer

of writs based on ineffective assistance will necessarily be granted. If, to avoid this possibility, the Court sets more modest standards, it may nonetheless be surprised to learn that a smaller, though not insubstantial, percentage of the criminal bar cannot meet even the lesser minimum requirements.[390] In any event, reducing the standard for effective assistance would water down the sixth amendment right to counsel and institutionalize existing incompetence.

Even if the Court decides not to adopt stringent competence requirements, it is highly doubtful that it could accede to the "sham or mockery" standard in contested cases[391] since the latter is arguably less rigorous than the test adopted in plea cases. Utilization of such a lesser standard would in effect penalize defendants who chose to go to trial rather than plead guilty, thus placing an impermissible burden on the right to trial.[392] Furthermore, the sham or mockery stan-

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than 25 percent of the lawyers appearing before them are genuinely qualified; other judges go as high as 75 percent . . . . It would be safer to pick a middle ground and accept as a working hypothesis that from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation.

Accord, United States v. DeCoster, 487 F.2d 1197, 1202 & n.21 (D.C. Cir. 1973); Bazelon, *supra* note 153, at 2 ("[W]hat I have seen in 23 years on the bench leads me to believe that a great many—if not most—indigent defendants do not receive the effective assistance of counsel guaranteed them by the 6th Amendment."). *But see* N.Y. Times, Feb. 11, 1978, at 1, col. 3. The Illinois and New Jersey State Bar Associations have "formally called on Chief Justice Burger to repudiate his contention that half of American lawyers are not qualified for courtroom appearances, or to back it up 'conclusively' with facts." *Id.* The article also reports that William B. Spann, Jr., President of the American Bar Association, "told a news conference today that he thought Chief Justice Burger's figures on courtroom incompetence were 'grossly disproportionate.' Mr. Spann said he thought that only about 20 percent of current lawyers were not qualified for such service." *Id.*

390. *See* Bazelon, *supra* note 153, at 2-3 (giving examples of "walking violations" of the sixth amendment, that "I come upon . . . week after week in the cases I review"); *cf.* United States *ex rel.* Healey v. Cannon, 553 F.2d 1052 (7th Cir.), *cert. denied,* 98 S.Ct. 221 (1977), in which the court, with one judge dissenting, invalidated a guilty plea because attorney's advice concerning effect of plea was not within range of competence required of attorneys in criminal cases. The defendant was on trial for murdering his wife and attempted to introduce evidence relating to his mental state and intoxication at the time of the crime. The trial judge denied introduction of this evidence and also advised that he would not instruct the jury on voluntary manslaughter. The defense counsel advised client that he could plead guilty and still attack the judge's rulings on appeal.

391. *See* United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973). Judge Bazelon noted that the older cases requiring defendant to show that the trial was a farce or mockery or to sustain a heavy burden of proof of unfairness may have been a reflection of the fact that an ineffective assistance claim was, during that period, grounded on due process alone. In view of the subsequent incorporation of the sixth amendment, Judge Bazelon suggested that more stringent standards were required. *See id.*

392. *Cf.* United States v. Jackson, 390 U.S. 570 (1968) (statute that authorized

dard appears to be inconsistent with the constitutional right to proof of guilt beyond a reasonable doubt.[393] Indeed, if the "within the range of competence demanded of attorneys in criminal cases"[394] standard set in plea cases means that whatever average standard prevails is sufficient to meet sixth amendment requirements, then the bar is permitted to set its own standards as to the quality of representation that is constitutionally required. If that average is low enough, it too may be in conflict with the reasonable doubt standard.

Whatever standard is ultimately adopted with respect to contested cases, close scrutiny of the state court trial record will be virtually mandatory, and testimony at federal habeas evidentiary hearings is a likely prospect. Thus, claims of ineffective assistance may well result in a substantial increase of time-consuming tasks for the lower federal courts and in considerable embarrassment for the bar.[395]

Additional problems arise if, in implementing the cause and prejudice requirements, the Court adopts, as *Sykes* seems to suggest, a miscarriage-of-justice or totality-of-the-circumstances test. Since such a standard appears to involve consideration of the probable guilt or innocence of the prisoner, the federal courts will be obliged to make ad hoc, case-by-case determinations with respect to this issue. Decisions of this kind are extremely subjective, and coherent guidelines for making them are hard to formulate. Such difficulties underlay the Court's adoption of per se rules in such cases as *Gideon v. Wainwright*[396] and *Miranda v. Arizona*.[397] Thus, adoption of the *Sykes*

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only the jury to impose the death penalty is an impermissible burden on the right to jury trial and thus unconstitutional); Simmons v. United States, 390 U.S. 377 (1968) (prosecution may not, at trial, use testimony given by defendant at hearing on unsuccessful motion to suppress evidence because such use deters assertion of fourth amendment defenses).

393. When counsel is truly ineffective and gives only nominal representation, the result may be a record almost barren of any indication of reasonable doubt. Because the defense attorney has failed to present available evidence favorable to the accused or has failed to cross-examine in a manner that discloses weaknesses and inconsistencies in the state's case, it may appear that the defendant is clearly guilty.

394. McMann v. Richardson, 397 U.S. 759, 771 (1970).

395. *See* Bazelon, *supra* note 153, at 25 ("[One] reason appellate judges maintain a hands-off policy [in ineffective assistance cases] is their reluctance to soil the reputations of appointed counsel . . . ."). *See generally* United States v. Katz, 425 F.2d 928, 931 n.3 (2d Cir. 1970), *discussed at* note 369 *supra* (court indicates its gratitude to appellate counsel "for his vigorous undertaking of the distasteful task of criticizing a brother lawyer on Katz' behalf").

396. 372 U.S. 335 (1963).

397. 384 U.S. 436 (1966). *But see, e.g.*, Gagnon v. Scarpelli, 411 U.S. 778 (1973) (determining existence of the right to counsel in parole revocation hearings on a case-by-case basis, with one of the factors to be considered being a colorable claim of innocence).

rule in an effort to conserve judicial resources by eliminating the necessity for hearings on the merits of constitutional claims ultimately may create substantially more work for the lower federal courts and result in the elaboration of amorphous rules to determine the circumstances under which the merits of a constitutional claim can be avoided.

4. *Those Were the Days, My Friend*

The overruling of *Noia's* deliberate bypass test with respect to trial defaults and the substitution of a variant of the adequate state ground rule in its place can be seen as a reflection of the yearning for a return to a bygone era in which state court convictions were arguably subject only to extremely limited review in federal habeas proceedings.[398] With characteristic grace, Justice Brennan's dissent in *Sykes* referred to "the Court's wistfully wishing for the day when the trial was the sole, binding and final 'event' of the adversarial process."[399] The harsh reality is that this form of judicial nostalgia has the potential for great danger. The *Sykes* majority appears determined to squeeze the more refined and complex due process issues of the 1970's into a simplistic remedial mechanism that might have been adequate for the more elementary and readily recognizable due process claims presented in the first half of the twentieth century, but which is wholly inadequate for full consideration of the types of constitutional claims likely to be presented in the future.

The cause and prejudice requirements articulated in *Sykes* seem to be designed to give recognition to and provide vindication for gross constitutional violations of the sort that occurred during the 1930's, 1940's, and 1950's.[400] The present Court has perhaps acquiesced in the allegedly more sophisticated elaborations of due process rights announced by the Warren Court by continuing to entertain the latter claims in the context of direct appellate review.[401] Its restriction of habeas, however, appears to be a backhanded means of containing

398. For differing views on the historical scope of the writ, compare Fay v. Noia, 372 U.S. 391, 399-426 (1963) (Brennan, J.), with *id.* at 449-63 (Harlan, J., dissenting).

399. Wainwright v. Sykes, 433 U.S. 72, 115 (1977).

400. *See, e.g.*, Irvin v. Dowd, 359 U.S. 394 (1959); Rochin v. California, 342 U.S. 165 (1952); Haley v. Ohio, 332 U.S. 596 (1948); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936); Powell v. Alabama, 287 U.S. 45 (1932).

401. *See, e.g.*, Brown v. Illinois, 422 U.S. 590 (1975); Michigan v. Tucker, 417 U.S. 433, 447 (1974). Although the Court has continued to hear appeals in habeas actions involving due process rights established by the Warren Court, *see, e.g.*, Brewer v. Williams, 430 U.S. 387 (1977), various members have suggested the possibility that claims such as those based on *Miranda* may subsequently be barred in habeas actions, *see, e.g., id.* at 413-14 (Powell, J., concurring).

these rights, either by effectively eliminating whole subject matter areas from the scope of federal habeas review[402] or by barring habeas review thereof whenever there is a procedural default.

The merits of the *Sykes* case, for example, involve giving content to the requirements for a voluntary waiver of *Miranda* rights, that is, determining under what circumstances a person under the influence of alcohol may be deemed to have waived his or her rights against self-incrimination.[403] The imposition of a procedural forfeiture in *Sykes* was made much easier because of the majority's disenchantment with *Miranda*'s prophylactic rules,[404] because the prescribed warnings were in any event given to the accused,[405] and because the elicitation of the confession and the conduct of the trial apparently comported with the Court's own conception of fundamental fair-

402. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 87 n.11 (1977); Castaneda v. Partida, 430 U.S. 482, 508 n.1 (1977) (Powell, J., dissenting); Stone v. Powell, 428 U.S. 465 (1976). The *Sykes* majority stated that it was not considering "in greater detail . . . three [other] areas of controversy attendant to federal habeas review of state convictions," 433 U.S. at 81, namely the types of claims cognizable in federal habeas proceedings, the degree of deference to be given state court resolution of the facts underlying constitutional issues, and the extent to which exhaustion of state remedies is required. It raised the latter issues only to demonstrate "this Court's historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged." *Id.* In view of the policy underpinnings of *Sykes*, particularly its emphasis on the importance of finality and on the state court trial as "the main event," *id.* at 88, 90, the Court in subsequent cases may be willing to make inroads on the proposition that "a state prisoner's challenge to the trial court's resolution of dispositive federal issues is always fair game on federal habeas," notwithstanding its explicit disavowal of any such intention in *Sykes*. *Id.* at 79-81.

Perhaps the greatest danger to federal habeas jurisdiction is the possibility that the Court will find that the suspension clause, U.S. CONST. art. I, § 9, cl. 2, does not preclude Congress from limiting the scope of habeas so as to deny collateral review of judgments of convictions by a court of competent jurisdiction. Four members of the Court have apparently accepted this view. *See* Bounds v. Smith, 430 U.S. 817, 835 (1977) (Burger, C.J., dissenting); Swain v. Pressley, 430 U.S. 372, 384 (1977) (Burger, C.J., joined by Blackmun & Rehnquist, JJ., concurring in part); Schneckloth v. Bustamonte, 412 U.S. 218, 252 (1973) (Powell, J., concurring).

403. *See* 433 U.S. at 74-76. In a similar manner, the decision in Stone v. Powell, 428 U.S. 465 (1976), made it unnecessary for the Court to resolve two important fourth amendment issues—the extent to which a state court, in a murder trial, may utilize evidence seized from a defendant arrested pursuant to an allegedly unconstitutional vagrancy statute and the permissibility of supplementing a defective warrant by presenting facts at the suppression hearing that were not given to the magistrate issuing the warrant. *Id.* at 469-71, 474 n.4.

404. *See, e.g.*, Beckwith v. United States, 425 U.S. 341 (1976); Michigan v. Mosley, 423 U.S. 96 (1975); Michigan v. Tucker, 417 U.S. 433 (1974).

405. *See* 433 U.S. at 97 (Stevens, J., concurring) ("[S]ince the police fully complied with *Miranda*, the deterrent purposes of the *Miranda* rule is inapplicable to this case.").

ness.[406] If, however, the same procedural default by Sykes' attorney had occurred after a police officer testified that the confession had been physically beaten out of the defendant, even though there was substantial other evidence of guilt, it is unclear whether an absolute forfeiture would have been imposed so readily.[407] Indeed, procedural defaults are less likely to occur when the constitutional violation is egregious and well-known, for even a relatively ineffective attorney is likely to object to such gross improprieties. Where, however, the implicated constitutional right is not well established or its violation is less shocking, the possibility of a procedural default increases.[408] Particularly in the case of marginally effective counsel, the issues most likely to be preserved for litigation in a federal habeas action are blatant constitutional violations.[409] Thus, the net effect of deci-

406. *Id.* ("[T]here is clearly no basis for claiming that the trial violated any standard of fundamental fairness.").

407. In Payne v. Arkansas, 356 U.S. 560 (1958), the Court reversed a murder conviction on the ground that defendant's confession was coerced. The coercion was primarily psychological, consisting, for example, of induced fear of mob violence, detention incommunicado, and denial of food for long periods. In response to the state's contention that there was other evidence of guilt, the Court ruled that "even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment" since "no one can say what credit and weight the jury gave to the confession." *Id.* at 568.

In Chapman v. California, 386 U.S. 18, 23 n.8 (1967), the Court stated that "our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," and cited *Payne* for the proposition that coerced confessions come within the above category.

408. *See* Estelle v. Williams, 425 U.S. 501 (1976); *cf.* Friendly, *supra* note 384, at 162 (footnote omitted):

> With today's awareness of constitutional rights, flagrant cases of police misconduct in search and seizure will rarely escape detection and correction in the trial or appellate process, even with the most slothful of defense counsel and the most careless of judges. The non-frivolous fourth amendment cases likely to give rise to collateral attack are those near the borderline, presenting hard questions of the meaning or application of Supreme Court decisions. Yet these are the cases where the deterrent function of the exclusionary rule is least important . . . .

409. In some instances, even arguably flagrant constitutional violations are overlooked by defense counsel. In United States v. Easter, 539 F.2d 663 (8th Cir. 1976), the court reversed a conviction for possession of a sawed-off shotgun on ineffective assistance grounds. Defense counsel had not challenged evidence seized by the police, who had kicked in the door of defendant's home, although they had no arrest or search warrant and although their basis for proceeding to the residence was a tip from a man identified only by his first name.

On retrial, defense counsel's motion to suppress the seized evidence was denied, defendant was convicted, and the Eighth Circuit affirmed. The appellate court found that the informant (who disappeared after giving the tip) claimed to be a victim of a robbery and said that he had followed the robbers fleeing in their car approximately one-half mile to the residence in question. (The alleged victim was on foot.) Approxi-

sions such as *Sykes* appears to be the preservation of federal habeas as a means of remedying more primitive constitutional errors, and Justice Rehnquist's reference therein to miscarriages of justice may be viewed in that context. Thus, limitation of habeas in effect becomes a means of diluting not only federal remedies but federal constitutional rights as well.[410]

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mately twenty police officers and a helicopter gun ship arrived at the scene and surrounded the house. Two officers knocked on the door and identified themselves and their purpose. After being told to wait a minute so that someone could get a key to open the door, the officers kept knocking and, after four or five minutes, broke down the door. Upon entry, they saw the defendant's brother in a bathrobe. The officers thereafter heard a noise in another room, opened the door thereto, and found defendant holding the shotgun. Finding exigent circumstances for the search and seizure, the Eighth Circuit affirmed the denial of the motion to suppress and affirmed the judgment of conviction, with one judge dissenting. United States v. Easter, 552 F.2d 230 (8th Cir.), *cert. denied*, 98 S. Ct. 145 (1977).

The fact that the Court of Appeals ultimately rejected the fourth amendment claim on the merits should not be regarded as an indication that that claim was frivolous. First of all, the court's decision is open to serious question. *See* United States v. Watson, 423 U.S. 411, 418 n.6 (1976); United States v. Easter, 552 F.2d 230, 235-36 (8th Cir.) (Heaney, J., dissenting), *cert. denied*, 98 S. Ct. 145 (1977). Moreover, had the default of the original trial counsel been deemed binding, an important question with respect to the propriety of police conduct would have been left unresolved, and a judgment of conviction possibly based on unconstitutionally seized evidence would have been affirmed without ever reaching the merits. Finally, regardless of the outcome, the court was forced to reach and decide constitutional issues and to articulate, for better or worse, the reasons for its decision. As a result of such determinations on the merits, precedents are created that can be either accepted or rejected by other courts. Furthermore, since the facts relating to police practices must be described and dealt with in the opinions, courts cannot take refuge in presumptions such as the asserted lack of deterrent value in the exclusionary rule or the ostensible absence of shocking police conduct characteristic of an allegedly bygone era.

410. *See* Bator, *supra* note 15, at 523-24. Recognizing the relationship between federal habeas and the expansion of due process rights, Professor Bator stated,

> It is natural that, in an era of such rapid growth in the substantive federal law, there should be a demand that the remedial system keep pace, that federal supervision be expanded to make sure that the states receive the new doctrines hospitably. And there is, of course, the underlying suspicion that in fact the states have not done so, that if we do not keep a sharp eye out, federal rights will be subtly eroded. . . .
>
> Yet we must remember that the remedial system we construct must be tailored for tomorrow as well as today. It is not fanciful to suppose that the law of due process for criminal defendants will, in the foreseeable future, reach a resting point, will become stabilized . . . . And if there is to be a stabilization of the law, we should be wary about constructing a remedial system premised on unceasing and revolutionary change.

Id. Professor Bator also rejected the notion that the availability of the writ was essential because state courts would remain indefinitely hostile to federal rights.

Due process may, however, be viewed without apologies as an unending evolutionary process that will require the continuing availability of the remedial function served by federal habeas. Moreover, it is questionable whether the states are in fact becoming

If, in the habeas context, the Court tacitly continues to measure violations of constitutional rights from the historical perspective of the first half of this century, little growth in the content of due process can be expected because, compared to that era, what occurs in courtrooms today seems, on the whole, to be reasonably fair.[411] To judge ourselves and our legal system by Scottsboro criteria may facilitate pats on the back, but it is not an appropriate measure of the extent to which we are a civilized society, and it creates an erroneous historical marker for determining how far we can and must go in assuring the fullest potential for vindication of federal constitutional rights.[412]

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more sympathetic to the vindication of federal rights. Indeed, future expansion of due process may engender correlative state court hostility. If the theory of ongoing growth of federal constitutional rights is accepted, then broad federal habeas jurisdiction continues to be an appropriate remedial mechanism for today and tomorrow.

411. *Compare* cases cited in note 400 *supra, with* Henderson v. Kibbe, 431 U.S. 135 (1977).

412. This is not to suggest that history is unimportant as a means of measuring the development of the law, but to emphasize that due process cannot be treated as a static concept. It is, for example, significant that confessions utilized in state courts were initially suppressed by the federal courts because they were the products of brutal physical beatings and torture. *See* Brown v. Mississippi, 297 U.S. 278, 281-85 (1936). Subsequent cases shifted the focus from whether the confession was secured in a shocking manner to whether the admission of guilt was free and voluntary, thus invalidating statements that were the result of psychological coercion. *See, e.g.*, Spano v. New York, 360 U.S. 315 (1959). *Miranda* carried the process still farther in an effort to assure the voluntariness of admissions by the defendant.

It is important to be aware of decisions such as *Brown*, both as a measure of the law's growth and as a reminder that such events did in fact take place. At this point, however, it should be taken as a given that confessions that are not the product of the defendant's free will are constitutionally impermissible and that *Miranda* should be the springboard for discussion of issues such as the intoxication question involved in *Sykes*. If such issues are viewed from the perspective of *Miranda* rather than *Brown*, they appear to involve claims that, far from being unduly refined and technical, are substantial in terms of a modern definition of "voluntary." Indeed, contemporary constitutional violations must generally be more subtle in order to avoid the certainty of reversal. But such "subtlety" scarcely makes the violations less reprehensible. *See, e.g.*, Brewer v. Williams, 430 U.S. 387 (1977).

Thus, the *Sykes* Court's suggestion that the case involved merely "a bare allegation of a *Miranda* violation, without accompanying assertions going to the actual voluntariness or reliability of the confession," 433 U.S. at 87 n.11, assumes sub silentio that the defendant was not raising a voluntariness issue when in fact he was. *See* Brief for Respondent at 31-32, Wainwright v. Sykes, 433 U.S. 72 (1977). The Court's approach implies a disdain for *Miranda*, hearkens back to the pre-*Miranda* era, and exemplifies the majority's predilection to utilize habeas solely for the most blatant constitutional violations. Indeed, the Court stated that it did not "pause to consider" whether a *Miranda* violation alone should be sent the way of *Stone v. Powell, see* 433 U.S. at 87 n.11, thus highlighting the relationship of state court defaults and piecemeal amputation of the federal habeas jurisdiction as alternative means of containing the development of due process rights.

Viewed in another way, the accessibility of federal habeas was previously on a parallel track with the development of due process rights, so that the expansion of due process in the 1960's was accompanied by a comparable expansion of the availability of federal habeas.[413] This symmetry, whether purposeful or not, served as a monitoring device, assuring equilibrium between input and output. By providing, in effect, that newly created rights were accompanied by appropriate federal remedies, the Court assured stability by guaranteeing access to at least one forum for vindication of federal constitutional rights. While the content of due process is no longer being significantly enlarged,[414] and there has been considerable diminution in some areas,[415] the general body of law regarding due process rights in criminal cases remains in effect—somewhat battered, but not overruled.[416] Thus, the due process prong is still relatively enlarged, while availability of federal habeas has been substantially constricted,[417] so

413. *Cf.* Reitz, *supra* note 15, at 1328-29 (describing the manner in which Moore v. Dempsey, 261 U.S. 86 (1923), expanded both the content of due process and the availability of the federal habeas remedy). *Compare* Duncan v. Louisiana, 391 U.S. 145 (1968); Stovall v. Denno, 388 U.S. 293 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); *and* Mapp v. Ohio, 367 U.S. 643 (1961), *with* Kaufman v. United States, 394 U.S. 217 (1969); Carafas v. LaVallee, 391 U.S. 234 (1968); Peyton v. Rowe, 391 U.S. 54 (1968); Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963); *and* Jones v. Cunningham, 371 U.S. 236 (1963).

414. There has, however, been some expansion of the content of due process. *See* Moore v. City of E. Cleveland, 431 U.S. 494 (1977); Brewer v. Williams, 430 U.S. 387 (1977); Estelle v. Williams, 425 U.S. 501 (1976); Mullaney v. Wilbur, 421 U.S. 684 (1975).

415. *See, e.g.,* Patterson v. New York, 432 U.S. 197 (1977); Manson v. Brathwaite, 432 U.S. 98 (1977); South Dakota v. Opperman, 428 U.S. 364 (1976); Michigan v. Tucker, 417 U.S. 433 (1974); Harris v. New York, 401 U.S. 222 (1971).

416. The landmark decisions of the Warren Court, *e.g.,* Duncan v. Louisiana, 391 U.S. 145 (1968); Miranda v. Arizona, 384 U.S. 436 (1966); Mapp v. Ohio, 367 U.S. 643 (1961), have not been overruled. For example, the holding in *Duncan* that the fourteenth amendment incorporates the right to trial by jury with respect to nonpetty criminal offenses has been blunted by subsequent decisions authorizing juries of less than twelve members and nonunanimous verdicts, *see* Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972), and "two-tier" trial systems, whereby the right to trial by jury is limited to "de novo appeals" in which there is a possibility of imposition of a harsher punishment, *see* Ludwig v. Massachusetts, 427 U.S. 618 (1976). *Duncan,* however, remains good law. Similarly, although there have been severe inroads with respect to both fourth and fifth amendment protections, *see, e.g.,* Beckwith v. United States, 425 U.S. 341 (1976); United States v. Watson, 423 U.S. 411 (1976), the Court has made it clear that there are certain points beyond which it will not retreat, *see, e.g.,* United States v. Chadwick, 433 U.S. 1 (1977); Doyle v. Ohio, 426 U.S. 610 (1976); Brown v. Illinois, 422 U.S. 590 (1975).

417. *See* Wainwright v. Sykes, 433 U.S. 72 (1977); Stone v. Powell, 428 U.S. 465 (1976); Francis v. Henderson, 425 U.S. 536 (1976); Estelle v. Williams, 425 U.S. 501 (1976); Davis v. United States, 411 U.S. 233 (1973). *See also* Swain v. Pressley,

that there is now a skewed relationship between federal rights and federal remedies.[418]

While perfect equipoise in this regard is perhaps not essential, some sort of balance is. When the Court creates new due process rights, there must be mechanisms for proper implementation, interpretation, and application thereof. The Supreme Court's limited capacity to hear cases on direct review is insufficient to fulfill this function.[419] While the Court considers that state tribunals now possess "appropriate sensitivity" to assure vindication of federal claims,[420] such ability and willingness may well depend upon the ultimate availability of a federal forum and upon the constitutional right having been in existence for some time and having been interpreted by both federal and state judiciaries.[421]

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430 U.S. 372, 385 (1977) (Burger, C.J., concurring in part) ("I do not believe that the Suspension Clause requires Congress to provide a federal remedy for collateral review of a conviction entered by a court of competent jurisdiction . . . ."); Schneckloth v. Bustamonte, 412 U.S. 218, 252-56 (1973) (Powell, J., concurring).

418. *See* notes 355-58 *supra* and accompanying text.

419. *See* Stone v. Powell, 428 U.S. 465, 526 (1976) (Brennan, J., dissenting) ("The Court does not, because it cannot, dispute that institutional constraints totally preclude any possibility that this Court can adequately oversee whether state courts have properly applied federal law, and does not controvert the fact that federal habeas jurisdiction is partially designed to ameliorate that inadequacy.") (footnote omitted); Wright & Sofaer, *supra* note 15, at 897-98; *Symposium*, *supra* note 356, at 28 (remarks of Paul Freund); Burger, *Reducing the Load on 'Nine Mortal Justices,'* N.Y. Times, Aug. 14, 1975, at 31, col. 2.

420. *See* Stone v. Powell, 428 U.S. 465, 493 n.35 (1976). Relying, *inter alia*, on Bator, *supra* note 15, the *Stone* majority rejected the argument that federal judges were better equipped to apply federal law than their state court counterparts. *See* 428 U.S. at 493 n.35. Justice Brennan responded by noting that

> some might be expected to dispute the academic's dictum seemingly accepted by the Court that a federal judge is not necessarily more skilled than a state judge in applying federal law. . . . For the Supremacy Clause of the Constitution proceeds on a different premise, and Congress, as it was constitutionally empowered to do, made federal judges . . . "the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."

Id. at 530 (Brennan, J., dissenting) (citation omitted) (emphasis deleted) (quoting in part Zwickler v. Koota, 389 U.S. 241, 247 (1967)). Justice Brennan pointed out that even if the state courts were generally not antagonistic to federal constitutional rights and could interpret them accurately, such circumstances did not warrant removal of federal habeas jurisdiction, for if the state decision was correct it would be upheld; if not, the writ would be granted. He further suggested that the decision in *Stone v. Powell* reflected a "manifestation of this Court's mistrust for *federal* judges." *Id.* (emphasis in original).

421. For example, in Stone v. Powell, 428 U.S. 465, 494 (1976), the Court held that fourth amendment claims of state prisoners were barred in federal habeas actions if the state "provided an opportunity for full and fair litigation" thereof. This decision was, however, rendered fifteen years after Mapp v. Ohio, 367 U.S. 643 (1961), made the exclusionary rule applicable to the states. This interim period afforded opportuni-

The federal courts, through their habeas jurisdiction, have traditionally served as a backstop, acting as the Supreme Court's surrogate in assuring the proper development of due process rights.[422] To be sure, the state courts have important contributions to make along the same lines, but to the extent that state courts impose procedural defaults, their capacity to interpret constitutional law is diminished. Perhaps of more importance, state tribunals may perceive federal constitutional rights within the context of local concerns, and their willingness to do so may be augmented by the realization that federal habeas review is now less likely to be available.[423] By definition, however, the federal courts have a national outlook. The federal intermediate appellate courts are multi-state and, generally speaking, will bring broader perspectives to bear on the development of constitutional rights. Without belaboring the obvious, the primary daily business of federal courts is to interpret federal law.[424] Since the Supreme Court is the final expositor of federal constitutional law, preserving

ties for litigation of numerous fourth amendment issues in both state and federal courts. Thus, in implementing the exclusionary rule, the state courts have been afforded a considerable body of precedent, both state and federal, from which to draw. For purposes of future development, however, removal of habeas jurisdiction with respect to fourth amendment challenges leaves the state courts able to rely only on (1) decisions of other state courts, which may be of limited precedential value because of local procedural rules that become enmeshed with the constitutional principle at issue; (2) decisions of lower federal courts in federal search and seizure cases, which may be based on the supervisory power rather than the fourth amendment and which often involve different types of crimes, as well as law enforcement officials with perspectives, job qualifications, and internal rules of procedure and practice that vary considerably from their state counterparts, *see* Miranda v. Arizona, 384 U.S. 436, 448-58, 463-64, 483-86 (1966); Ker v. California, 374 U.S. 23, 31-34 (1963); Mapp v. Ohio, 367 U.S. 643, 657-60 (1961); and (3) Supreme Court decisions, reviewing state and federal search and seizure claims that, because of the size of the Court's docket and the fact that fourth amendment claims often turn on the particular factual context, can provide only limited guidance in this area. The virtual elimination of federal habeas jurisdiction over fourth amendment claims by state prisoners thus limits the ability of each state court to draw on the federal courts' interpretations of search and seizure issues arising in its jurisdiction and involving its local police officials. Given the complexity of the constitutional rights involved and the almost infinite number of possible permutations, the loss is not insubstantial.

422. *See* Stone v. Powell, 428 U.S. 465, 511-12 (1976) (Brennan, J., dissenting).

423. Until the millenium arrives, there will presumably be some state courts that misunderstand and misinterpret Supreme Court decisions and others that are simply recalcitrant. The existence of federal habeas jurisdiction serves as a reminder that erroneous interpretations of federal law will not be allowed to stand. *See id.* at 520-21 (Brennan, J., dissenting); Bator, *supra* note 15, at 510.

424. *See generally* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 168 (1969) (endorsing the federal question jurisdiction of the United States District Courts as necessary "to protect litigants relying on federal law from the danger that the state courts will not properly apply that law, either through misunderstanding or lack of sympathy").

the accessibility of the lower federal courts for habeas cases assures the broadest base from which the Court can seek views, ideas, and perhaps ideals, in interpreting the Constitution. Conversely, each contraction of federal habeas diminishes the wealth of perspectives from which the Supreme Court and, indeed, all federal and state courts, can draw.[425]

IV. CONCLUSION

It is, in the end, simply sad that, only fourteen years after its birth, *Fay v. Noia,* a decision marked by brilliance and compassion not only on the part of the majority but also in Justice Harlan's dissenting opinion,[426] has been replaced by *Wainwright v. Sykes,* an opinion that refers to the issue presented as a "simple legal question,"[427] describes the elements of the deliberate bypass test, insofar as they related to the trial context, as "the dicta in *Fay* v. *Noia,*"[428] designates *Noia* as a decision that painted with an unnecessarily

425. It may be argued that, notwithstanding the *Sykes* decision, a plethora of perspectives can be obtained as a result of habeas suits initiated by nondefaulting prisoners. There are two responses. First, by imposing a forfeiture in the *Sykes* case itself, the Court precluded the lower federal courts from examining and resolving an interesting and important constitutional issue: the circumstances under which an intoxicated person can voluntarily waive *Miranda* rights. The issues raised by other defaulting prisoners are also likely to be of equal import and sophistication. *See* text accompanying note 408 *supra.* Second, *Sykes* must be viewed in the context of the Court's general retrenchment in the area of federal habeas. To the extent that other constitutional claims are *Stone v. Powell*'ed and to the extent that the policy arguments underlying *Sykes* may be utilized to deprive nondefaulting defendants of federal habeas hearings, *see* note 402 *supra,* the present plethora of perspectives may become a paucity of precedents.

For a somewhat more sanguine assessment of recent Supreme Court federal habeas decisions, see Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court,* 86 YALE L.J. 1035 (1977).

426. *See* 372 U.S. 391, 476 & n.28 (Harlan, J., dissenting) ("I recognize that Noia's predicament may well be thought one that strongly calls for correction. But the proper course to that end lies with the New York Governor's powers of executive clemency, not with the federal courts.").

Sykes' situation may not be considered as dire as Noia's since Noia's confession was admittedly coerced, his sentence was life imprisonment, the failure to appeal was based in part on his fear of the death penalty in the event of reconviction, and his coperpetrators were free. Because the Court imposed a forfeiture in Sykes' case, however, it is impossible now to ascertain if his confession was involuntary. Moreover, the decision applies not only to Sykes, but also to the Abraham Francises incarcerated in our prisons now and in the future, many of whose situations may be considerably more compelling than Noia's.

427. Wainwright v. Sykes, 433 U.S. 72, 77 (1977). Elsewhere in the majority opinion, the Court referred to the basic issues involved in interpreting section 2254 as "perplexing problems." *Id.* at 78.

428. *Id.* at 85, 87.

"broad brush,"[429] and establishes as a substitute for deliberate bypass the vague dual requirements of "cause" and "prejudice" whose only "precise content"[430] would unquestionably have to include the element of harshness.

As part of the policy justification for its apparently rigid forfeiture rule, the *Sykes* Court delivers an encomium for the "contemporaneous-objection rule" and in effect describes the attorney-client relationship in a criminal case as one in which the servant is omnipotent and the master subservient. Reinforcing the contemporaneous objection requirement with a strong forfeiture rule, it is said, will accomplish a variety of salutary objectives, such as deterring "sandbagging,"[431] forcing the prosecution "to take a hard look at its hole card,"[432] and assuring that the state court trial is "the 'main event,' so to speak, rather than a 'tryout on the road.' "[433]

As this Article has attempted to point out, however, not all of the blessings of *Sykes* are mentioned in the Court's opinion. The new rule diminishes the value of federal habeas as a safety valve. It also skews federal rights and remedies, tends to dilute those rights, and will significantly curtail the effectiveness of the lower federal courts as sources for interpreting the due process protections afforded defendants in criminal cases. *Sykes* may also have a double-or-nothing effect, barring federal habeas in the case of those defendants who may have been most poorly represented in state courts and who, as a result of their attorney's negligence or incompetence, have already committed procedural defaults that preclude the possibility of relief in state court. In like fashion, the *Sykes* opinion should ultimately force the Court to deal meaningfully with the issue of ineffective assistance of counsel since every state prisoner who is barred from federal court on the basis of a procedural default can be expected to return with an incompetence claim. In short, to use language that the author of the *Sykes* opinion might find congenial, the time will come to pay the piper.[434]

429. *Id.* at 88 n.12.
430. *Id.* at 91.
431. *Id.* at 89.
432. *Id.*
433. *Id.* at 90.
434. Or in the words of Arnett v. Kennedy, 416 U.S. 134, 154 (1974) (Rehnquist, J., plurality opinion), the Court will be required to "take the bitter with the sweet."